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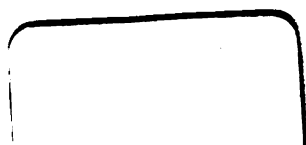
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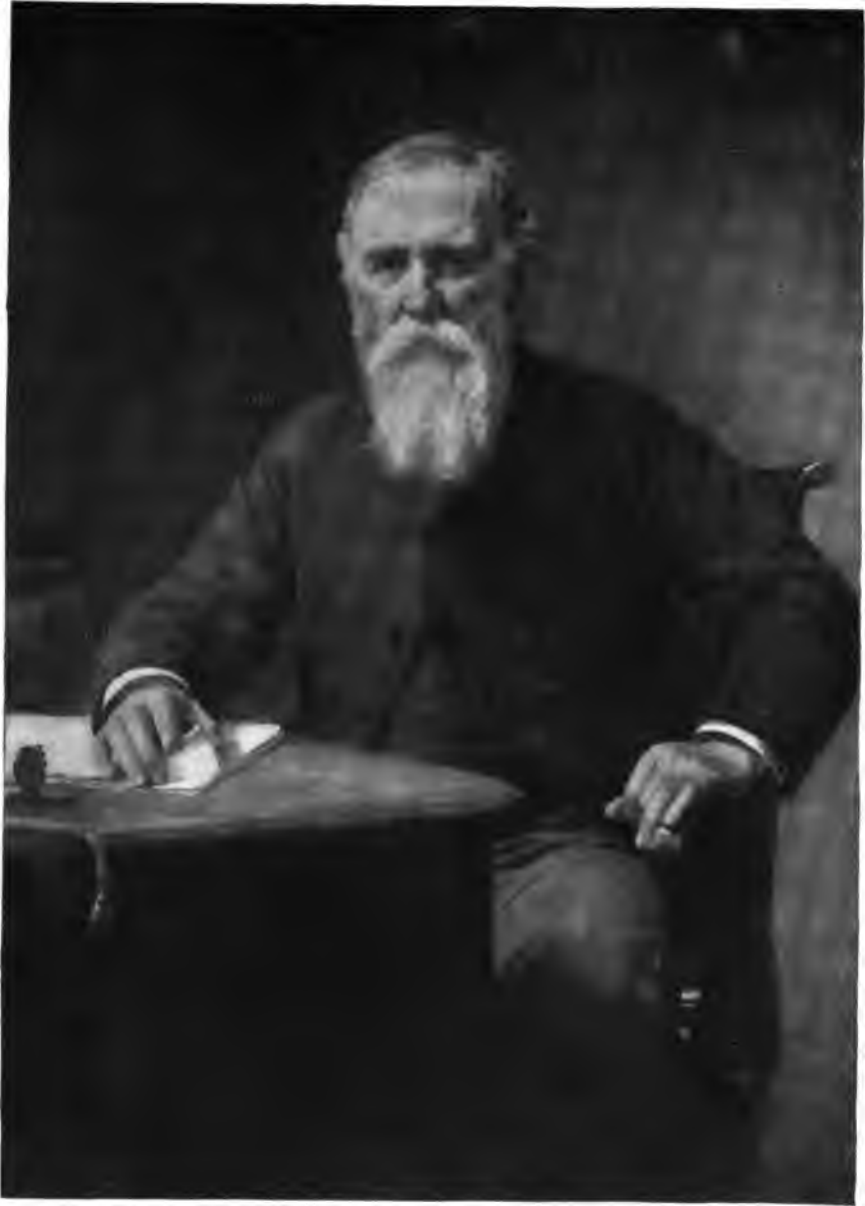


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**C. C. Langdell**

✓ HISTORY  
OF THE  
HARVARD LAW SCHOOL  
AND OF  
EARLY LEGAL CONDITIONS  
IN AMERICA



By  
CHARLES WARREN  
OF THE SUFFOLK BAR

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VOLUME II.

ILLUSTRATED

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NEW YORK  
LEWIS PUBLISHING COMPANY  
1908

L15457

JAN 31 1939

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WARREN, C.

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## CHAPTER XXV.

### THE STORY-GREENLEAF PERIOD—1837-1845.

This year 1837 was marked by the decision in two other cases in the United States Supreme Court, which denoted the change in its attitude from the days of Marshall.

In *Mayor of the City of New York v. Miln* (11 Peters 62), argued by D. B. Ogden against Walter Jones, a New York statute relative to the duty of masters of vessels to report all passengers arriving, was held constitutional, as not being a regulation of interstate commerce. In *Briscoe v. Bank of the Commonwealth of Kentucky* (11 Peters 257), argued by White and Southard against Henry Clay and Benjamin Hardin, the Court reached a conclusion upholding the State statute, directly in conflict with Marshall's opinion in *Craig v. Missouri* (4 Peters 410), decided in 1830. Both these cases, like the Charles River Bridge Case, had been previously argued during Marshall's lifetime; and Story in his dissenting opinion in both cases, referred to the fact that Marshall agreed with him in believing the statutes involved to be unconstitutional. So great was Story's despondency over the new trend of the Court under Taney, that in a letter to Judge McLean, May 10, 1837, he said:

The opinion delivered by the Chief Justice in the Bridge Case has not been deemed satisfactory; and, indeed, I think I may say that a great majority of our ablest lawyers are against the decision of the Court; and those who think otherwise are not content with the views taken by the Chief Justice.

There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind, from which I augur little good. Indeed, on my return home, I came to the conclusion to resign.

A writer in the *North American Review* in 1838, also uttered the same doleful forebodings in reviewing volume eleven of *Peters Reports*(1):

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(1) See *Constitutional Law, a Review of 11 Peters* in *North Amer. Rev.*, Vol. XLVI (Jan. 1838).

The volume is one of unusual and in certain respects even of singular interest. . . . It can hardly have failed to strike the dullest observation after a survey of the present volume, that some considerable change has come over the spirit of our Supreme National Judicature upon this great class of (constitutional) questions. . . . The prospect is charged, perhaps to our too anxious apprehension, with shades which have not hitherto seemed to rest upon it . . . under the shape, not to say pretext, of internal regulations of police of the protective kind on the maritime side of commercial States. . . .

Massachusetts also, we are sorry to say, furnished her contribution to swell the present volume. We say this with sorrow, because whatever may be thought of the merits of the question, it is undeniable that the tone and character of the decision chime in with doctrines which tend, or may be urged, deplorably, to the subversion of the principles of law and property.

What was the law of the Court upon some important points remains so no longer. Within a brief space we have seen the highest judicial corps of the Union wheel about in almost solid column and retreat some of its most important steps.

It is quite obvious that old things are passing away. The authority of former decisions which had long been set as landmarks in the law, is assailed and overthrown by a steady, destructive aim from the summit of that stronghold, within which they had been entrenched and established.

. . . . It is very remarkable also that all the principles yielded by these decisions either have relation to the sovereign powers of the Union or to the very essence of social obligation. . . . We can hardly avoid the reluctant impression that it (the judiciary) has already capitulated to the spirit of the old confederation; and that we are fast returning, among other things, to an old continental currency, and to what were once denominated, moreover, anti-federal doctrines.

Under the progressive genius of this new judicial administration we can see the whole fair system of the Constitution beginning to dissolve like the baseless fabric of a vision.

The year 1837-38 at the Law School began with 62 students from 15 States; from Massachusetts 26; from Louisiana 6; from South Carolina 4; from Maine, New York, Maryland, Virginia, Kentucky, 3 each; from New Hampshire, Rhode Island, Connecticut, Georgia, Mississippi, Tennessee, 2 each; from Ohio 1. This was the first year of Van Buren's administration and of the great commercial panic; and the consequent financial distress undoubtedly had its effect on the attendance at the School.

Henry Wadsworth Longfellow entered upon his Professorship of French, Spanish and Belle Lettres, at this time; and for many



years his lectures were eagerly attended by the law students, many of whom came into intimate and personal acquaintance with the poet.(1)

In the class entering in the fall of 1837, the most prominent student was Richard Henry Dana, Jr., then just home from his *Two Years Before the Mast* voyage. Of his Law School days (1837-40), Dana wrote later(2):

Free from all the details, chicanery and responsibilities of practice, we were placed in a library under learned, honorable and gentlemanly instructors, and invited to pursue the study of jurisprudence as a system of philosophy. From the first recitation it became exceedingly interesting to me, and I have never yet found it dry or irksome.

The School was now "in full blast", as Story expressed it, and the mass of work upon his shoulders almost overwhelmed him, so that he wrote:

The Circuit Court has been constantly in session and I have been compelled to be there. There are nearly 70 law students, and every day that I could command any leisure I have been obliged to give them lectures. My work on *Equity Pleadings* is in press, and one-third of it remains to be written before I go to Washington. . . . I fear my own health will not stand such various efforts of duty.

In the spring of 1838, his *Equity Pleadings* was published, dedicated to Jeremiah Mason. At the same time he was keeping close track of the English cases, books and judges, through a voluminous correspondence with Charles Sumner, who was then in London.

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(1) Longfellow at this time was a young man of 30 years, very fond of gay attire, especially waistcoats, and when he went to engage rooms was mistaken for a student, as he records in his diary, May 25, 1837:

"The first time I was in the Craigie House was on a beautiful summer afternoon in the year 1837. I came to see Mr. McLane, a law student, who occupied the southeastern chamber. . . . McLane left Cambridge in August and I took possession of his room, making use of it as a library or study, and having the adjoining chamber. At first Mrs. Craigie declined to let me have rooms. She had resolved, she said, to take no more students into the house. But her manner changed when I told her who I was." In his diary, April 3, 1840, he records:

"There is one law student who comes in occasionally to my class. I always lecture better when he is there. This shows how much depends upon the audience."

See *Life of H. W. Longfellow*, by Samuel Longfellow.

(2) *Richard Henry Dana*, by Charles Francis Adams (1890).

The relations of both Professors to the School at this time are well depicted in the following letters from Greenleaf to Sumner. (1) On Jan. 28, 1838, he wrote:

I am so bound to Dane Hall for the winter that I am able to do little more than look in upon them (Hillard and Joel Giles) every few days, and hear of clients who have called for me till their patience was gone.

I am hard at work as usual with a winter class of 47 and a promise or threat of a hundred next autumn. The judge is at Washington—sick at heart and longing for the quiet of home and for a good and substantial reason for resigning the Bench.

And on June 13:

Our School is steadily on the increase. We expect to number 70 or 80 next term. We shall welcome as many as we can be personally conversant with, and I think we can in this way do good to a hundred, if not more. Beyond this number we shall be obliged to divide the School and employ another Professor. I think I may say my own ability to instruct keeps pace with the School, and that none of us here study law without profit. The result of wider and deeper researches is to make me less exclusively addicted to the Common Law, and to create a livelier interest in other forms of jurisprudence; in short, to lead me to regard the law much as it is treated by Judge Story in his incomparable *Commentaries on Bailments*—as a system of principles—of higher and holier origin than any codes whatever, though disclosed with more or less symmetry and beauty in the codes of all civilized nations. For our own country, I am satisfied with the forms of Common Law as the medium of remedy, improving it, with a liberal hand, to meet our habits and usages. Indeed, I think there is a great practical wisdom in Sir Robert Walpole's *Quietas ne moveat*, and in old John Adams' *While You Stand Well, Stand Still*.

. . . . Our country's prospects are brightening, for Van Buren's doom is sealed. Clay will be the next president.

A letter to Sumner from Story, in August, 1838, sets forth well the latter's enthusiastic interest in the School and the response from his pupils:

I think the better men are acquiring a higher tone of thinking. We talk the matter into our law students daily. They begin already to be wide awake to the dignity of the law and its morals.

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(1) See unpublished letters in *Sumner Papers* in Harvard College Library.

Greenleaf is excellently well. The Law School flourishes. We had sixty good fellows last term, with the prospect of at least seventy next term. I have given nearly the whole of last term, when not on judicial duty, two lectures every day, and even broke in upon the sanctity of *dies non juridicus*, Saturday. It was carried by acclamation in the School, so that you see we are alive. . . . The revolution in public opinion is great and decisive. The Jackson age of humbug is passed away. Much of the mischief that he did can never be cured—for he virtually destroyed the Supreme Court—but commerce and trade will come back to their accustomed health and prosperity.

The year 1838-39 opened with an attendance of 52 from 14 States; from Massachusetts 22, Maine and Louisiana 5 each, New York and Connecticut 4 each; Virginia and Kentucky 3 each; Pennsylvania and Mississippi 2 each; Vermont, Maryland, South Carolina, Georgia, Ohio, 1 each.(1)

Among the notable students at this time were William Maxwell Evarts (L. S. 1838-39) of New York, Alexander H. Bullock (L. S. 1838-40) later Governor of Massachusetts, Charles Devens (L. S. 1838-40) later United States Attorney General and Judge of the Massachusetts Supreme Court, Marcus Morton (L. S. 1838-40) later Judge of the Massachusetts Supreme Court, James Gore King of New York (L. S. 1839-40), and Ebenezer Rockwood Hoar (L. S. 1837-40) Judge of the Massachusetts Supreme Court and United States Attorney General.

On Sept. 7, 1838, Greenleaf wrote to Sumner(2):

We have just commenced our autumn term in the Law School with 67 students, and shall have upwards of 70. The Southrons increase among us, especially those from Louisiana, who say they study their own code better here than at home.

And again on Sept. 19:

This being Wednesday you will of course imagine that it has been working day with your friend. I have expounded and ground up the usual portion of *Stephen on Pleading* and *Blackstone* on the relation of Husband and Wife. The School numbers 76, who have just thundered past my door and upstairs to

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(1) By vote of May 26, 1838, of the Corporation, the Harvard Commencement now came on the fourth Wednesday of August, and the terms and vacations were rearranged.

(2) See unpublished letters in *Sumner Papers* in Harvard College Library.

attend an extra with the judge—"Whom God preserve"—for he is working wonders every day with the law.

The new law magazine then recently founded in Boston—the *Law Reporter*—stated in October (Vol. I):

The prosperity of this School is, we believe, unexampled in this country. . . . To spend a part of their novitiate at Cambridge has become almost a matter of course with students in law, and the number that go through the whole course it not large.

We understand that the number of students at present connected with the School is 76. 76 young men to be instructed in the law by two professors! . . . The latter may well exclaim with Dr. Watts:

"And if to eighty we arrive

We rather sigh and groan than live".

We doubt not, however, that they will be able to manage an hundred at least. After that, and the time will soon come, they may well demand assistance of the corporation.

During the winter Story began work on his *Commentaries on Commercial and Maritime Law*, which he intended to comprise five or six volumes, and of which he finished only three—*Agency*, *Partnership*, and *Bills of Exchange*.

An amusing comment on Story's colleagues on the Supreme Bench at this time is found in a letter written by Longfellow from Washington, Feb. 9, 1839:

We then called upon Judge Story who received us very kindly and sent for all the judges of the Supreme Court to come down and see us. So down they came and sat all in a row in front of the fire. I could hardly believe my eyes when I beheld these men—so raw and rusty! What an inferior looking set!—And that one of these should have been put over Judge Story! Ye Gods! It doth amaze me!

The session of the Supreme Court was marked by the decision of the great case of *Bank of Augusta v. Earle* (13 Peters 519) which was argued by D. B. Ogden, Sergeant, and Webster, against C. J. Ingersoll and Van de Graff, and which was the first case establishing the right of a corporation to do business outside the State of its incorporation.

Greenleaf in a letter to Sumner in London, Jan. 18, 1839, giving him many commissions to buy books for the Law School Library, thus described the School conditions(1):

(1) See unpublished letters in *Sumner Papers* in Harvard College Library.

This is the first day of the winter vacation, tho' nominally the last term (College year now has term of 20 weeks, 12 vacation). The judge was with me till the 10th of January, and with a School of 87 we had plenty of work. It was never in finer order, and its reputation is now such that I should not be surprised at any number which may hereafter be added. . . . From all this you will rightly infer, not only that "Old Dana" is out of debt, but that the "steam" is somewhat increased. . . . This much for items—except that the old Dana house, that fine old mansion on the hill south of our village, was last night destroyed by fire.

And on May 17, he again wrote (1) :

Our institution continues to increase and I hope we become yearly better instructors. The present number of students is about 70—and they occupy all our time. . . . My life passes without events except hearing recitations, giving lectures and studying law. I am growing older—yet not graver, but rather more buoyant, holding cheerfulness a religious duty and cultivating charity with all men.

In the spring term of 1839, there had entered the School one of its most famous students—noted later, not as a lawyer, but as a master of American literature—James Russell Lowell. The fact that he was induced to study law by hearing Webster argue, is an illustration of the effect and influence of the giants of the Bar of those days upon the young men. The following amusing extracts from his letters show his vacillation as to choice of a profession :

October 11, 1838, I am reading *Blackstone* with as good a grace and as few wry faces as I may.

October, 1838. A very great change has come over the spirit of my dream of life. I have renounced the law. I am going to settle down into a business man at last, after all I have said to the contrary. Farewell, a long farewell, to all my greatness. I find that I cannot bring myself to like the law. . . . If I thought it possible that I ever could love the law (one can't be a lawyer without it), I wouldn't hesitate a moment, but I am confident that I shall never be able to be on speaking terms with it.

November 8, 1838. On Monday last I went into town to look out for a place, and was induced, en passant, to step into the United States Court, where there was a case pending in which Webster was one of the counsel retained. I had not been there an hour before I determined to continue in my profession and study as well as I could.

Feb. 2, 1839. I have quitted the law forever.

March 9, 1839. The more I think of business, the more really unhappy do I feel and think more and more of studying law—I shouldn't wonder if next Monday saw me with *Kent's Commentaries* under my arm. I think I might get to take an interest in it.

May 26, 1839. Rejoice with me for tomorrow I shall be free. Without saying a word to anyone I shall quietly proceed to Dane Law College to recitation.

June 4, 1839. I begin to like the law. And therefore it is quite interesting. I am determined that I *will* like it, and therefore I *do*.

July 22, 1839. If I live, I don't believe I shall ever (between you and me) practise law.

Sept., 1839. I begin to like the law; but I shall let my fate be governed by circumstances and influence.

March 14, 1841. (39 Court St.) I am in Chas. G. Loring's office, and I am getting quite in love with the law.

The Law School continued to increase in prosperity, and opened the year 1839-40 with 85 students.

The pressure on the Professors was now so great that Greenleaf wrote to Quincy, Oct. 18, asking that his salary be permanently raised to \$2500, or that an additional instructor be appointed(1):

So that I may supply the deficiency by my own exertions at the Bar; a measure which the claims of my family at the present rate of emolument render an indispensable duty. When I came into the department the regular exercises of the Royall Professor were on 3 days only in the week, and the School contained less than one-half its present number. It has since been thought expedient by the Professors to increase the weekly exercises by nearly doubling the number, for the benefit of the students of the Institution, and the School has increased from 42 to 88, increasing the demands on my time so far as to leave me scarcely any for practice in the courts, which is essential to supply the deficiency of salary for my current support. During the past year I have been obliged to decline professional engagements to an amount greater than the sum received from the University.

The additional instructor, on whom both Greenleaf and Story had long had their eye, was Charles Sumner, whose appointment as a regular third Professor they both desired. Story had, in the previous June, declared that the wish that lay nearest and dear-

(1) See letter in *Harv. Coll. Papers*, 2nd Series.

est to his heart was to leave the Law School in good hands, and that he desired Sumner and Hillard to succeed himself; and Greenleaf had written to Sumner (who was then in London) as early as Sept. 7, 1838(1):

You are daily acquiring a vast intellectual and moral power to be welded on your return. Our earnest desire is to have you occupy an additional professor's chair with Judge Story and myself, bringing into our institutions all that power and all the affluence of your mind to bear upon the great and increasing number of young men who come to us for instruction in constitutional and municipal law.

Our responsibilities to our country are great for the influence we thus indirectly exert upon her institutions; but we meet them with alacrity and the courage of honest and conscientious men. We want the aid of a yoke-fellow who is both an accomplished civilian and a sound common lawyer, versed in both systems but addicted to neither, a liberal, enlightened, and yet practical, jurist, and sound in constitutional law. Need I say that no man fills this space in our eyes like yourself.

So make all your acquisitions, my dear friend, bear on the subject. . . . Keep always in mind that you are to occupy an additional chair with us as our colleague in the great and honorable work, practising also in the courts in the more important causes . . . and in due time hasten home to the station we are secretly endeavoring to prepare for you.

Greenleaf about this time had removed his residence temporarily to Boston, and was hard at work on his book on *Evidence*, referring to which he wrote to Sumner, Nov. 29, 1839(2):

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(1) In view of the fact that Sumner's future destiny was not to fill a professor's chair, but to become the great anti-slavery statesman, it is interesting to note that in this year 1839, there was decided, in Illinois, the first case involving the question of slavery, in which Abraham Lincoln was counsel—*Bailey v. Cromwell*, 4 Ill. 71. See *Lincoln as a Lawyer*, by Frederic Trevor Hill.

The facts of this case were, that one Bailey gave a note in payment of the purchase price for a slave girl named Nance. The maker of the note declined to pay, on the ground that Nance was not a slave, and employed Lincoln as his counsel. He lost in the lower court but won in the Supreme Court.

(2) See unpublished letters in *Sumner Papers* in Harvard College Library.

The "Professor Kent" referred to was the son of Chancellor Kent, later Story's successor in the Harvard Law School. "Brougham's wig" was long kept as an interesting relic in Dane Hall, but has now disappeared. It had apparently been sent by Sumner to Kent, for in Feb. 4, 1839, he had written from London to George S. Hillard, "Lord Brougham has given me his full bottom Lord-Chancellor's wig, in which he made his great speech on the Reform Bill. Such a wig costs twelve guineas; and then the associations of it! In America it will be like Rabelais' gown." To

I go daily to Cambridge, for both the judge and myself give lectures every day except Saturday. Our Law School has been up to 89 this term, and has already attracted a degree of attention and favor that almost alarms as well as surprises me, since the reputation thus increased demands for its support so large an amount of science and so much weight of character in both professors. I console myself by constant study and daily putting forth my utmost—and when that shall not suffice, it will be plain that my true position will be elsewhere, and the professor's chair—*detur digniori*.

You ask about my book on *Evidence*. It is about half written, but as I can now write only in vacation or nearly so, it will not go to press till next summer.

The judge is now at work upon the second edition of his *Bailments*. His labors are incessant, and his learning vast. Take him all in all, I regard him as the most accomplished jurist now living.

. . . . . We have had an unusual number of English visitors this year to our Law School, and amongst them three Harcourts, sons of the Archbishop of York—The Solicitor sat out one of the judge's lectures. Brougham's wig was sent to us by Professor Kent with a very amusing letter. The New York Law School is defunct. I think ours is greatly improved in thoroughness and exactness of instructors—at least in the Royall Department;—and the quantity of study is doubled—the exercises now numbering 16 a week.

From Washington, Story wrote to Greenleaf, Feb. 6, 1840, referring to the latter's famous book: "I am glad to hear that you are going on with your work on *Evidence*, which I shall look to with deep interest as a noble contribution to the common stock of the School."

A correspondence at this time between Story and R. H. Dana, then a pupil in the School, in which Dana took occasion to criticise the lightness of a sentence imposed by Judge Story in the Circuit Court on the officers of a vessel for cruelty to sailors, brought out the following tribute of affection from Dana:

It is unnecessary to mention to you, sir, (for I trust you have always felt it,) the respect and deep personal attachment entertained for you by every member of our School. It is greater than I have ever known from young men toward one standing in such a relation to them. In these feelings I will not allow that I am surpassed by any one of them. It is a pleasure to me to have

---

Judge Story, Sumner wrote Feb. 10, 1840, "I am glad you have Brougham's wig. I always wished it to go to the Law School. Put it in a case and preserve it."



such sentiments and to speak of them at all times. I have also been brought up with a conservative reverence for office and age. Having these feelings and principles strong in me, I was at times almost led to think that, considering every thing,—my youth, my situation in the School, &c.,—it might be better for me not to come out upon such a subject. Yet the motives which I have mentioned, and the consideration that if I did not take it up there was no probability that any one else would, have governed me.

Trusting that in what I have done I can in no way cause you an unpleasant feeling, but that it may at some time be of use to one or another of my fellow beings, I hope you will always believe me to be,

Yours, with the deepest respect and affection,

R. H. Dana, Jr.

During the spring of 1840, Charles Sumner was again engaged for a short time as Instructor in the Law School.(1)

Owing to the frequent "Town and Gown" disturbances between the Cambridge folk and the students, including the law students, the following regulations for the Law Department were voted by the Corporation, July 25, 1840, on Greenleaf's recommendation(2) (Regulations 6 and 8 in the Revision of 1847).

(6) Any member of the Law School knowingly participating with an undergraduate in the violation of any of the Laws of the University, shall be subject to those laws in like manner as an undergraduate and be liable to the same discipline, to be administered by the Law Faculty.

(8) Members of the Law School resident in any College Hall shall be subject to such regulations for the preservation of good order and discipline as are now or may be established by the University, to be administered by the Law Faculty.

The necessity for these regulations appears clear from an entry by T. W. Higginson in his diary, narrating a disturbance which arose, the following year(3):

(1) Pierce in his *Memoirs and Letters of Sumner*, Vol. I, narrates that on Sumner's arrival in Boston May 5, 1840, from Europe, "he was met by Hillard, walking from the railway station, carrying in his hand some exchequer tallies. (These relics were kept at the Harvard Law School for some time. They each consisted of a piece of wood scored with notches of different sizes split into two parts—'tally' and 'counter-foil'. They were abolished in the reign of George III and William IV. See *Best on Evidence*, Part III, Chap. I, s. 215 note). . . . Soon after reaching home, he reluctantly filled, for a few weeks, a vacancy as instructor in the Law School."

(2) See letter of Greenleaf, *Harv. Coll. Papers*, 2nd Series, Vol. X.

(3) Extracts from *Diary of Thomas Wentworth Higginson*, *Harvard Graduates' Magazine*, Vol. I.

April 18, 1841. Nothing of great importance, except that we came near having a pitched battle with the townspeople Monday night in consequence of a slight row last Friday, when they turned the students out of the Phrenological lecture, and there was a great gathering at the cry of "Harvard", but to no effect, there being no trouble when we got down there, and the faculty being on hand. Great preparations were made for Monday night—the Prex made a speech after prayer, and Mr. Professor Greenleaf addressed the law students—yet it would, after all, have taken little to provoke one, for many townspeople were collected and every student was in his room with a club. I walked up and down for a long time reconnoitering, really excited in hopes of a row, though I thought it doubtful.

Higginson adds that "these disputes almost always originated with the Southern law students, who were then numerous, and were an impetuous and hot headed set."

Another and even more serious disturbance arose a year later, in May, 1842, between the Harvard undergraduates, aided by the Law School students, and Boston rowdies. The strife between "Town and Gown" had long been active, but the immediate cause of the trouble in 1842 was the burlesque imitations by various Boston truckmen of a few students, who "went in as usual with their Oxford caps". It is picturesquely described as follows by T. Prentiss Allen (Harv. 1842)(1):

The crowd soon amounted to 2000 or 3000 and forced carriages to stop. . . . About 7 o'clock, as one or two students were passing through Washington Street, they were followed and insulted by a motley collection of scamps, who stoned them as they went along.

This was seen by some law students, who rushed to assist the others, and a party of twenty-five was soon collected. All re-

(1) See *Town and Gown in the Old Times* by T. Prentiss Allen in letter of May 24, 1842, *Harvard Graduates Magazine*, Vol. VIII.

The disturbances among the students were very frequent at the time. The visiting committee of the overseers reported Jan. 20, 1842, regarding various attempts to set fire to the fence and a wooden building in the yard and recommended criminal prosecution. They also made a report on a general combination of the students not to recite to an obnoxious instructor.

The most famous of all College Rebellions had occurred in 1834 when, owing to the unpopularity of the young instructor on elocution, a rebellion arose among the Freshmen. Their cause was taken up by the other classes with such ardor that practically the entire Sophomore class was dismissed by the Faculty, and many of the Seniors lost their degrees.

For interesting accounts of this, see *Memoirs of Henry Lee*, by John T. Morse, Jr. (1905); *University Hall*, by Henry Lee in *The Harvard Book*; *Life of Josiah Quincy*, by Edmund Quincy; Diary of John Quincy Adams.

monstrance proving useless against 200 or 300 they were forced to use their canes and make way for themselves through the crowd—though with great difficulty. They thus fought themselves along through Tremont Street to Tremont House, but the keeper, of course, refused them admittance and they were compelled to fight on the steps. The police were prompt, and captured one or two of the scamps, and some navy lieutenants assisted the students in repelling the mob; and they returned safe to Cambridge.

But soon the report was circulated that a number of the mob were coming to Cambridge to attack us in our sanctum. This roused the spirit of Harvard's sons. Soon the mob came on—about 400 or 500 in all. They formed in front of the college in the street with shouts, and cast stones at Dane Hall and at some of the other college buildings. The President and the Proctors were on the alert, and guarded all the entrances to the yard so that no student should go out.

. . . . The first of the mob who entered the yard would undoubtedly have been shot, such was the determination of the students, and the southerners were perfectly reckless. The blackguards stayed about an hour.

. . . . The President yesterday went into town and saw the mayor who took prompt and energetic measures to subdue any riotous assembly in that city, and the bridge was guarded. The Lancers were also prepared for immediate action.

In 1840-41, at the opening of the Law School fall term, there were 99 students from 21 States, one from Quebec, and one from Ireland.

An interesting commentary on the fact that a large number of the students at this time entered the advanced classes of the School, instead of beginning their studies in the Lower or Junior Class, is found in the *Law Reporter*, December, 1840(1):

We are surprised that the comparative number in the Junior Class (of the Law School) is not greater than it is. It is certainly desirable that they should enter the school at the beginning of their studies, rather than at a later period. It is often thought to be very necessary for a student to know something of the practice of the law before he begins upon the theory; but it is surely best to begin the study of any science in a regular systematic manner under suitable instructors, and the practice will take care of itself in due time.

The winter session of the Supreme Court at Washington was

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(1) *Law Reporter*, Vol. III, p. 319 (1840).

notable for two celebrated cases. The first, *Groves v. Slaughter* (15 Peters 449), involving the Mississippi statute prohibiting the introduction into the State of slaves as merchandise for sale, and affecting upwards of \$3,000,000 of property, was argued by Henry D. Gilpin and Robert J. Walker, against Walter Jones, Henry Clay, and Daniel Webster. The second, *U. S. v. Amistad* (15 Peters 518), in which Judge Story delivered one of his most celebrated opinions, was of peculiar interest, because of the appearance for the defendant of John Quincy Adams, then seventy-four years of age and whose last engagement as counsel before the Court had been in 1809, thirty-two years before, in *Hope Insurance Co. v. Boardman* (5 Cranch 56).

The case involved the freedom of certain negroes who, while being brought to this country illegally by slave traders, had gained mastery of the vessel and murdered the officers. Having been taken together with the vessel into a United States port by a United States war vessel, they were claimed as slaves by their alleged Spanish owners. Much political feeling was aroused by this case, and Adams, in his diary, thus describes his argument(1):

Feb. 24. The court room was full but not crowded, and there were not many ladies. I had been deeply distressed and agitated till the moment when I rose, and then my spirit did not sink within me. With grateful heart for aid from above, though in humiliation for the weakness incident to the limits of my powers, I spoke for 4½ hours with sufficient method and order to witness little flagging of attention by the judges or the auditors. . . . The structure of my argument was perfectly simple and comprehensive, needing no artificial division into distinct points, but admitting the steady and undeviating pursuit of one fundamental principle, the ministration of justice. I then assigned my reason for inviting justice specially, aware that this was always the duty of the court, but because an immense array of power—the Executive Administration, instigated by the minister of a foreign nation—had been brought to bear in this case on the side of injustice. . . . I did not, I could not, answer public expectation; but I have not yet utterly failed. God speed me to the end.

Story writing to his wife, Feb. 28, 1841, describes the old

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(1) Still more interesting is Adams' full account as to his retainer and of the progress of the case. See *Diary of John Quincy Adams*, Vol. X.

man as full of his accustomed virility and belligerency, and speaks of the "extraordinary" argument made by him—"extraordinary, I say, for its power, for its bitter sarcasm, and its dealing with topics far beyond the record and points of discussion."

In April, 1841, the students of the Law School took part in the great procession in Boston on the occasion of the death of the President of the United States, William Henry Harrison, which Thomas Wentworth Higginson, then a senior in College, describes in his diary: "We were to form in Pemberton Square at 9:30—The seniors at first mustered there, the others waited till near ten for the law students to come up, and then marched down Beacon Street. . . . Whole number about 200—25 seniors, 48 juniors, 70 sophs, 75 fresh; Law students, 60 or 70. Merrill, Creswell, Marshall, Preston, Standard Bearers"; and the diary entry closes, "tired and dusty—took the 2:30 P. M. 'bus to old Cambridge."

During this spring, Story published his *Commentaries on Partnership*, dedicated to Judge Samuel Putnam in whose law office he had been a student.

The year 1841-42 opened with 115 students (according to Greenleaf's Report of Oct. 19).

The fall of 1841 was marked by a murder trial in the State of New York which had nearly involved the United States in a war with Great Britain—*People v. Alexander McLeod*. This case arose out of the burning of the steamer "Caroline" and the murder of an American citizen, by a Canadian rioter in Dec., 1837(1). Of this case J. Q. Adams wrote, Oct. 12, 1841: "The trial involves at once a question of peace and war with Great Britain, and of civil war and the existence of the Union between the General Government and the Government of the State of New York. This is one of the consequences naturally flowing from the Jeffersonian doctrine of nullification and of state rights; and that doctrine had its origin in the root of all evil—slavery." ✓

That war did not result either from this episode or from the dispute over the Maine boundary line, at this time, was due to the supreme ability of Daniel Webster and to the tact of the English Ambassador, Lord Ashburton; and with the negotia-

(1) See 25 Wendell 483; 1 Hill 377; 26 Wendell 663.

tions of these men Judge Story had intimate connection, through advice given to both. (1)

Their connection with Harvard and the Law School is interestingly told by George W. Huston (who was a student in the School, 1841-1843).

I remember that during the winter of 1841-42, Daniel Webster, still secretary of state under President Tyler, and Lord Ashburton, the British Minister at Washington, spent many weeks at Cambridge. There was then pending a very grave question with England about the boundary between the State of Maine and Canada. These great men were there to examine in the library at Harvard, certain old maps and charts, which bore upon this question of boundary, and which could be found no where else. In addition to Lord Ashburton—who, having married an American wife, was assumed to be friendly to her country—England was believed to have another man present, not officially, but to counsel and advise in questions that might arise. This was the Earl of Carlisle, who was, however, better known in America as Lord Morpeth, not only as the ablest member of the British Parliament, but as a distinguished man of letters; an author whose pen alone would have rendered him famous. Lord Morpeth—for so the earl was known to us students, and called while in Cambridge—had then retired from Parliament, and appeared at Cambridge ostensibly as a literary man visiting a great American college, but he was, nevertheless, very generally believed to have been sent by the British government to watch and guard the progress of this vast boundary question. Lord Morpeth was then advanced in life and a man of peculiarly displeasing appearance. He would quietly take a seat on one of the benches among the students. Judge Story, guilelessly led by some designing student, would wander away from the lesson and begin one of his fascinating reminiscences, telling in his charming way what Lord Mansfield, in England, had thought on some great question, and what Chief Justice Marshall, in our country, had said upon the same matter. All the while Lord Morpeth would sit in a negative manner, apparently half asleep, his clumsy figure drooping, and with his heavy eyebrows nearly covering his dull eyes, and his thick lips hanging down, thus becoming a really

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(1) Sumner wrote, Sept. 4, 1842, "You will read Webster's letters to Lord Ashburton. They are the poetry of diplomacy. I know of no such papers in our history—in dignity and strength of composition, in the stately pace of the argument and the firmness of the conclusion; and who excels, who equals Webster in intellect? With the moral weight of Channing he would become a prophet." On March 23, 1841, he had written, "We have been on the verge of war. But our Webster understands our difficulties and the law of nations, and will not lack judgment or boldness; so I fear not."

repulsive object to behold. But when Judge Story would turn suddenly toward him and say: "And what do you think, my Lord, on that question?" the old man would change as quickly as a flash of lightning. He would instantly gather up his lips, raise his eyebrows, and, with sparkling eyes and intelligent face, he would make a brilliant reply.(1)

The January Term of the Supreme Court in 1842 was notable for the rendering by Judge Story of two of his most famous opinions. In the case of *Prigg v. Pennsylvania* (16 Peters 337), he held that the Federal Fugitive Slave Act of 1793 was constitutional; that Congress had exclusive power under the Constitution to legislate regarding fugitive slaves, and that the Fugitive Slave statute of Pennsylvania was unconstitutional.(2) No act of Story's life ever received so bitter condemnation. This year marked the beginning of the Free Soil party; and by those upholding its views, the decision in the *Prigg* case was regarded as a direct surrender to the South and Southern principles. The attacks on Story were, however, entirely unwarranted; for no man was more sincere in his opposition to slavery, and he believed most firmly that the legal doctrine which he had announced in the *Prigg* case would furnish the strongest bulwark to the National Government against the increase of the slave power in the States.

(1) *Memories of Eighty Years*, by George W. Huston (1904).

(2) See *Com. v. Tracy*, 5 Metc, 1843, construing the opinions in this case.

John Quincy Adams wrote in his diary under date of March 10, 1843: "I spent much of this day in transiently reading the report of the trial in the Supreme Court of the United States of the case of *Edward Prigg against the Commonwealth of Pennsylvania*, otherwise called the Fugitive Slave case—seven judges, everyone of them dissenting from the reasoning of all the rest, and everyone of them coming to the same conclusion—the transcendent omnipotence of slavery in these United States, riveted by a clause in the Constitution."

George Ticknor wrote to William Ellery Channing, April 20, 1842:

"On the subject of our relations with the South and its slavery, we must, —as I have always thought,—do one of two things: either keep honestly the bargain of the Constitution as it shall be interpreted by the authorities —of which the Supreme Court of the United States is the chief and safest—or declare honestly that we can no longer in our conscience consent to keep it, and break it. I therefore rejoice at every legal decision which limits and restrains the curse of slavery; both because each such restriction is in itself so great a good, and because it makes it more easy to preserve the Union. I fear the recent decision in the case of *Pennsylvania and Maryland* works the other way, but hope it will not turn out so when we have it duly reported; and I fear, however the decisions may stand, that the question of a dissolution of the Union is soon to come up for angry discussion.

See *Life and Letters of George Ticknor*.

The other notable decision of Story at this Term was that landmark in Federal law, *Swift v. Tyson* (16 Peters 1), a case argued by W. H. Fessenden of Maine against Richard H. Dana, Jr.(1)

In this spring of 1842, Greenleaf published the first volume of his great work on *Evidence*, dedicated to his colleague,(2) who responded with the following beautiful tribute, Jan. 6, 1842:

I will not attempt to describe the emotions of deep sensibility and gratitude with which it overwhelmed me. They will not be forgotten by me to the latest hour of my life. Although I am thoroughly conscious that I have no just title to much that you have said in commendation of my labors, and that your friendship has given to them a warm and glowing color, which imparts an attraction far beyond their intrinsic merits, yet I cannot find it in my heart to ask you to alter a single word, since it expresses your own sentiments and feelings, with a truth and sincerity far more gratifying to me than all the homage of public fame, so hardly won, so transitory, and yet so eagerly sought.

Our connection has been to me, indeed, a source of inexpressible pleasure and satisfaction. I recollect, with pride, that when Professor Ashmun died, my thoughts turned upon you as the man of all others best fitted to supply his place; and the corporation, with a unanimity and promptitude which deserve the highest commendation, seconded the choice.

In one respect, I cannot permit your dedication to pass without a suggestion, which truth and justice demand from me. You and I have equally labored in the same good cause in the Law School, with equal zeal and equal success. We have shared the toils together, and if we have earned a just title to public confidence and respect, you are every way entitled to an equal share with myself, nay, in some respects, to more. But for you, the School would never have attained its present rank. Your learning, your devotion to its interests, your untiring industry, your steadfast integrity of purpose and action,—have imparted to all our efforts a vigor and ability, without which, I am free to say, that I should have utterly despaired of success. Nay, more, but for your constant coöperation and encouragement in the common task, I should have drooped and lingered by the way side. But what I dwell on with peculiar delight, is the consciousness that we have never been rivals, but in working together have gone hand in hand throughout; that not a cloud has ever passed over

(1) It is interesting to note that at this session Rufus Choate (who had become Senator for Massachusetts in 1841, when Webster became Secretary of State under President Tyler) argued against Franklin Dexter his first case in the United States Supreme Court (*Prouty v. Ruggles* 16 Peters 336).

(2) See especially review in *Law Reporter*, June, 1842, Vol. V.



our mutual intercourse, and that we have lived as brothers should live; and, I trust in God, we shall die such.

Greenleaf again besought the Corporation about this time to appoint an additional Professor to take the immediate care and superintendence of the School and instruct the Junior Class in *Blackstone* and *Kent's Commentaries*; and renewed his previous request for permission to transfer his residence to Boston, stating that it was essential to him in his practice, which was confined to cases and law arguments in the Circuit and Supreme Courts, saying:

This limited practice has always led me into town nearly every day for a few hours, and any other professor will naturally be obliged to do the same. And I am unable to perceive that, to retain it, would withdraw from the Law School any of the time and attention I have been accustomed to bestow and am still ready to give.<sup>(1)</sup>

The Corporation, while willing to grant the latter request, could not yet see its way clear to providing for a third Professor.

During this year, Story was consulted by many lawyers from Rhode Island regarding the new Constitution for that State, the agitation for which resulted in the so-called Dorr's Rebellion<sup>(2)</sup>. The year was also marked by two cases in the Massachusetts Supreme Court of the highest importance,—*Farwell v. Boston and Worcester R. R. Corp.* (4 Metc. 49), argued by Charles G. Loring against R. Fletcher and G. Morey, in which Chief Justice Shaw established the "fellow servant" doctrine in the law of Torts; and *Com. v. Hunt* (4 Metc. 111), the first labor case in the

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(1) See letter of April, 1842, *Harv. Coll. Papers*, 2nd Series, Vol. XI. Greenleaf's reputation at the Bar was constantly increasing and the number of important cases which he argued while still Law Professor, is remarkable.

Some of the more notable were *Cambridge v. Lexington*, 17 Pick. 227 (1835) in which he appeared with Fay and Whipple against S. Hoar and Peabody; *Andover and Medford Turnpike Corp. v. County Com.*, 18 Pick. 486 (1836) which he argued against Choate; *Wright v. Dane* 5 Metc. 485 (1843) which he argued against S. Bartlett and B. R. Curtis; *Dana v. Valentine* 5 Metc. 8 (1842); *Ingalls v. Bills* 9 Metc. 1 (1845); *Smith v. Hurd* 12 Metc. 371 (1847).

His appearance in the United States Circuit Courts was also very frequent.

(2) For interesting account of this Rebellion see *Com. v. Blodgett*, 12 Metcalf 56 (1846), and *Luther v. Borden* 7 Howard 1 (1849); also article on the *Trial of Thomas W. Dorr for High Treason in Law Reporter*, Vol. VII (1844).

United States decided by a court of last resort. It was argued by Atty. Gen. James T. Austin against Robert Rantoul(1).

The year was memorable in the annals of the Law School by reason of the bequest made to it in the will of Benjamin Bussey, a wealthy merchant of Roxbury, reported to the Corporation, June 25, 1842, as one of the largest donations for public education that Harvard College or any other institution in Massachusetts had ever received under the will of any private individual.

Benjamin Bussey was born on March 1, 1757, in that part of Stoughton, Mass., now Canton.

He served in the Revolutionary War at Ticonderoga, and also in the Saratoga Campaign which resulted in Burgoyne's defeat. In 1778, he started in business at Dedham, Mass., as a goldsmith; later he took up a general mercantile trade, especially in furs, and by 1790 had accumulated \$25,000, when he moved to Boston. In 1800, he removed to his Roxbury farm, where he resided during the rest of his life, taking great interest in agriculture.

In 1819, he started, at Dedham, one of the first successful woolen mills in the United States. This mill property, proving exceedingly prosperous, in 1841, it was estimated, that his profits had been upwards of \$170,000. He died, January 13, 1842, at the age of eighty-three.(2)

By his will, dated July 30, 1835, after making due provision for his family, and after many annuities and legacies to his friends, he bequeathed the whole residue to Harvard College(3), one-half

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(1) See *Law Reporter*, Vol. VII, for contemporaneous article on this case.

The state of public opinion on the subject of labor unions at this time may be gathered from a review of the *Constitution of the Trades Union of the City and County of Philadelphia*, in *Amer. Quarterly Review*, Vol. XIX, as late as June, 1836, in which it is said:

"We protest against the introduction of such foreign commodities as Trades Unions into the United States. . . . They are the productions of other soils and are fastened under other influences."

(2) See *Benjamin Bussey in Dedham Historical Register*, Vol. X (1899). *The Dedham Woolen Mills in Dedham*, *Dedham Historical Register*, Vol. II (1891). *MSS. Autobiography* in Harvard College Library.

See also *Boston Daily Advertiser*, February 10, 1842; and *Tribute to the Memory of Benjamin Bussey*, by Rev. Thomas Gray.

(3) The will read as follows:

"And I do further order and direct that from and after the time that my said mansion house and estate in Roxbury called "Woodland Hill" shall cease to be occupied by any of my family, pursuant to the directions herein given, that the same be conveyed by my said trustees to the President and Fellows of Harvard College, for the purposes hereinafter mentioned. And I do further order and direct that after the payment of security of payment of all the several sums of money and annuities hereby

of the net income of the property so conveyed to be devoted to courses of instruction in practical agriculture and other similar foundations,—now the Bussey Institution,—the other half of the net income to be equally divided, one portion thereof to be paid “for the encouragement and promotion of theological education,” and the other moiety “to the encouragement and promotion of legal education in said College, by the endowment of professorships or scholarships in the Theological and Law Schools respectively, by the purchase of books, erection of buildings, and by such other means as may in their judgment render the income of the property hereby appropriated most available in the accomplishment of the objects proposed.”

The liberal and patriotic views which he entertained of the value of education were well set forth, as follows :

Before proceeding to make a further disposition of my property and estate, I think, it will tend to elucidate and explain the several devises and dispositions thereof hereinafter made, to state that in making this will, I have two objects chiefly in view. My primary object has been to provide in the best and most secure manner in my power a comfortable and respectable living after my decease for my family viz. : My wife if she shall outlive me, and my daughter and her children now living, and to make some provision for great grandchildren ; my second object has been to benefit my fellow citizens and posterity according to my ability, by devoting ultimately a large portion of my fortune to promote those branches of education, which I deem most important and best calculated to advance the prosperity and happiness of our common country. I have also felt a particular desire to increase the usefulness of the schools of Law and Theology in Harvard College in Cambridge. In a nation whose government is held to be a government of laws, I deem it important to promote that branch of education which lies at the foundation of wise legislation and which tends to ensure a pure and uniform administration of justice and I have considered that in a country whose laws extend equal protection to all religious opinions, that education which tends to disseminate just and national views on religious subjects is entitled to special patronage and support.

The year 1842-43 opened at the Law School with 111 students from 22 States.

ordered to be paid by my said trustees, and after all the purposes of said trusts, so far as respects my family and all annuitants herein mentioned shall have been secured and accomplished, all the residue of said trust property and estate, real, personal and mixed with the proceeds and accumulations thereof shall be conveyed and transferred by my said trustees to the President and Fellows of Harvard College.”

The second day before Commencement of this year, August 23, 1842, was noted for the first meeting of the Harvard Alumni Association, an oration on *The Danger and Difficulties of and Dignity of Scholarship in the United States* being delivered by Story as Vice-President, the President, John Quincy Adams, declining. (1)

(1) The history of the formation of this Association is interestingly told by Rev. Dr. John Pierce and by John Quincy Adams in their diaries. Pierce notes, August 28, 1839 (See *Mass. Hist. Soc. Proc.* 2nd Series, Vol. V (1890):

"After dinner the alumni met in the chapel and a committee of five were chosen to prepare a plan for an annual meeting of the alumni and submit it the next year. It was painful to see how small a number appeared to take interest in this project, the meeting while I was there amounting at no time to more than 50."

Adams writes, August 18, 1840:

"Afternoon visits from Mr. William Minot and Charles P. Curtis. There has been for two or three years a project for a general association of the graduates of Harvard University to hold annual meetings the day before Commencement, intentionally as a substitute for the meetings and literary exercises of the Phi Beta Kappa Society the day after Commencement."

The day before the last Commencement there was a meeting of the Alumni at which a committee of five were appointed to prepare and report on the day before the ensuing Commencement a plan for such a general association. Mr. Minot and Mr. Curtis are members of that committee and came to enquire if I would consent to be put in nomination for the office of President of the Society. I felt myself honored by the proposal, and said I had only two objections against it—one the consciousness of my inefficiency for the office, and the other a warm regard for the Phi Beta Kappa Society and an aversion to join in any measure which would seem to have a bearing of hostility to them. They said that the members of the Phi Beta Kappa Society had themselves originated the proposal of the general association and almost universally favored it. Mr. Curtis read to me the report to be made, including a constitution for the new society. A president, vice-President, and seven directors, are proposed for the organization of the society—Judge Story and Edward Everett are proposed for vice-Presidents. I consented to place my name at their disposal."

Pierce writes August 26, 1840:

"In the afternoon at IV there was a meeting in the chapel; and the report of the committee appointed last year recommending to form a Society of Alumni to meet on the day before Commencement, dine together and have appropriate exercises, was accepted; and John Quincy Adams was chosen president."

Adams writes, April 26, 1841:

"There was in this morning's newspapers an advertisement of a meeting of the Alumni of Harvard University at half past three this afternoon, which I attended with my son. There were between 60 and 70 persons present and I was called to preside at the meeting. The Society was formed last summer, and in my absence I had been unanimously elected its President. The purpose of the present meeting was briefly stated by Mr. John Pickering, and more at large in a speech by Judge Story. The constitution of the society was then read, and a book was opened to which each member of the Society subscribed his name, with the payment of one dollar. Two resolutions were then offered by Mr. John Pickering and adopted, for raising a subscription to erect a building which may serve as

The exercises were held in the church; and afterwards between five and six hundred graduates sat down at dinner in "the new and spacious halls in old Harvard" with Story as presiding officer. The following account of the toasts connected with the Law School, appeared in the *Boston Daily American* (1).

"To the toasts of 'Nathan Dane—He added the law to the prophets. The prophets can get along very well without the law, but the Law cannot get along without some profits,' Professor Greenleaf responded in a beautiful speech, abounding in humor and pleasantry. He must imagine the President to be absent, as he was as much interested in the Law School as himself; and he was very happy to do so, as there were some things that he could say in his absence, which perhaps he could not venture upon in his presence.

He denominated Mr. Dane as the American Viner, and expressed a grateful sense of the munificence of Boston merchants who had followed the example of that Prince of Merchants, Isaac Royall, such as her Hancocks, her Eliots, her Per-

a dining hall for their anniversaries and on Commencement Days, and in which the Panorama of Athens, some years since presented by Theodore Lyman, may be on constant exhibition. President Quincy presented plans for such a building with estimates of the cost, amounting to \$6000 if of wood, \$12,000 of brick, and \$17,000 of stone. The subscription was opened and several of the members present subscribed each \$100, for which sum I subscribed my name at the head of the list. There was a committee of three, William Minot, Charles G. Loring and Samuel A. Eliot, which called the present meeting, and to whom were now added four others—John Amory Lowell, Benjamin A. Gould, Dr. Francis Parkman and my son, Charles Francis Adams—to carry the resolution in execution. The meeting was held in the Circuit Court Room and about 5 o'clock adjourned without delay."

Pierce writes, August 25, 1841:

"There was no meeting of the Alumni. It had been intended to observe the first anniversary of the society on the day before Commencement. For this purpose Hon. John Quincy Adams was chosen to deliver the first Anniversary address. Judge Story was chosen as his substitute. But Mr. Adams was delayed by the extra session of Congress. Judge Story has recently had an illness which he urged as an excuse."

In the *Harvard College Archives, Harv. Coll. Papers*, 2nd Series Vol. X) is a letter from a Committee of the Alumni signed by William Minot, Jan. 25, 1842, offering \$2500 towards expense of fitting up lower story of Harvard Hall "with an understanding that it may be used at the annual meeting of the Association of the Alumni, and that the corporation will permit them to use the meeting house for the literary exercises at these meetings."

(1) See *Daily American* Aug. 25, 1842. Other speakers were President Quincy, Dr. Bigelow, Rev. Dr. Noyes, Washington Allston, Daniel Lord of the New York Bar, Benjamin R. Curtis, Secretary, Chief Justice Shaw, Josiah Quincy, Jr., President of the Phi Beta Kappa, Gov. John Davis, George Bancroft, Charles P. Curtis, George S. Hillard for the class of 1828, ex-Governor Swain of North Carolina, Richard H. Dana.

kins, Bussey, etc. After paying a handsome tribute to their liberality, and in allusion to the sentiment which had been given, he would give 'The merchants of New England, whose sagacious liberality applied the remains of the profits to the endowment of the School of Law.'

The President said there were several other sentiments touching the foundation, although the regular toasts were got through with, which he would give—"The Law School of Harvard University—The flourishing condition of that branch of the University is established by one *green leaf*.' . . . 'The Law School may it ever remain, as now, in the green leaf of its prime.'

. . . 'The Dane Law School—If such things are done in the green leaf, what may we expect in the dry.'

The Marshal said a sentiment had been handed in which he begged leave to give,—'The Law School—Nathan Dane not only laid the foundation, but put on its first Story.'

In October of this year arose the famous case of George Latimer, a fugitive slave. A Virginian named Gray applied on October 22 to Judge Story for an order under the Federal Fugitive Slave Act, which was granted, placing the alleged slave in Gray's custody and assigning a date for a hearing. Pending the hearing, Latimer was placed in custody of the sheriff in the Suffolk County jail. Two days later, a writ of personal replevin was sued out in Latimer's name and heard by Chief Justice Shaw, who denied it pending the hearing in the Federal Court.(1) Meanwhile Judge Story became ill and a hearing was assigned by District Judge Peleg Sprague for November 25. But owing to the popular feeling aroused, the sheriff of Suffolk County ordered Latimer's removal from the jail; and finally the slave owner accepted the sum of \$400, raised by subscription, for a release of his claim, his counsel having become satisfied that "to attempt to keep Latimer in any other place than the jail was to raise at once a signal for riot, if not bloodshed."

This action was taken chiefly by reason of a meeting held by the abolitionists in Faneuil Hall on October 30, in which speeches

(1) Latimer was also arrested on charges of larceny on Oct. 19 and Oct. 20; and attempts made by various abolitionists to rescue him from the officer resulted in the case of *Commonwealth v. Tracy*, 5 Metc. 536 (1843), in which Chief Justice Shaw delivered an elaborate opinion construing Judge Story's decision in *Prigg v. Pennsylvania*.

See full account of the Latimer proceedings in the courts in *Law Reporter*, Vol. V (March, 1893).

of the most violent character were delivered. The Chairman compared Judge Story with the infamous English Judges, Scroggs and Jeffries, and termed him "Slave catcher in chief for the New England States." Newspaper publications followed during the succeeding weeks, in which fierce denunciations were made of Judge Shaw, and threats were indulged in that "the slave never shall leave Boston, even if to gain that end our streets pour with blood". The ministers, Theodore Parker and John Pierpont, were especially active and violent, in attacks on Judge Shaw and Story. Charles Sumner wrote, December 16, 1842, "I suppose Judge Story would have felt bound to order the poor creature into slavery, but the decree could not have been enforced. . . . This incident has called forth and given body to the feeling already existing on the subject of slavery in Massachusetts."

Under such conditions it may well be imagined how great an interest was taken in this case by the large body of Southern students in the Law School.

During the fall and winter of 1842-43, Judge Story's health became so precarious that he was forced to give up all work, and to omit attendance at the session of the Supreme Court at Washington. The Corporation, in March, 1843, having voted a leave of absence without loss of pay, a trip to Europe was contemplated by him, but never consummated.(1) During the spring he published his last book, the *Commentaries on Bills of Exchange*, dedicated to Greenleaf, as his "full testimony to the eminent ability, the unwearied diligence, the ample learning and the conscientious fidelity with which you have performed all your official duties," and "a memorial of our long, uninterrupted and confidential friendship."

During Story's illness, Charles Sumner was again appointed Instructor, Feb. 25, 1843.(2)

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(1) See vote in *Corporation Records* March 25, 1843.

"The President stated to the Board that he had received from Professor Story a letter requesting leave of absence during the ensuing season for the purpose of seeking a restoration of his health in a foreign climate.

*Voted* that leave be granted as requested and that his salary as Professor be continued during his absence, and that Professor Story's letter be placed on file."

(2) See vote in *Corporation Records*, Feb. 25, 1843:

"It having become necessary to provide some further temporary means of instruction in the Law School on account of the indisposition of the Hon. Joseph Story, Dane Professor of Law.

A graphic description of the Law School at this time has been written for the author (1908) by Judge David Cross of Massachusetts, N. H., who was a law student in the second term of 1842-43:

Text books were used for study and twenty-five pages or more were given for each lecture. Story was in poor health and gave lectures on the United States Constitution occasionally. Greenleaf and Sumner gave two or three lectures every day. Story, as I remember it, asked no questions at his lectures; Sumner asked a few questions, but Greenleaf many. My recollection of Sumner is that he was a ready and agreeable talker upon whatever was the theme of the lecture, Agency, Partnership or other subjects; that he confined his talk to the given pages in the text book, but that he did not question the students or so develop the lecture as to present anything new outside of the text book, or compel the students, by his method, to hard and close study of the lesson. Out of the class room Sumner was agreeable and companionable. One thing I remember about his talk after a lecture in relation to his travels in England. After his graduation from the Law School he visited England, and Judge Story gave him letters of introduction to Judges and eminent lawyers there. One of the Judges to whom he had a letter of introduction invited him to take a seat with him on the bench during the trial of a case, and in the course of the trial a question of law arose, when the Judge, turning to Mr. Sumner said: "I do not recollect any reported case that covers this question of law. Do you?" Mr. Sumner immediately named the parties, volume and page in the English Reports, of a case exactly in point. The Judge sent for the book and found it as Mr. Sumner stated, and gave his decision accordingly. Mr. Sumner said: "The Judge seemed greatly surprised at my readiness, and treated me as though I was really a lawyer. The fact was," said Mr. Sumner, "I had in the Moot Court at the Law School a case in which this precise question was in issue, and I made myself familiar with all the cases I could find, and especially this one. This was my good luck," Mr. Sumner said, "and it is doubtful if I could have given so exact an answer in any other case."

Story and Greenleaf were very different in temperament, in method and in speech. They seemed fond of each other, and a vein of humor would appear in each of them whenever they talked upon questions in which we knew they differed.

Story was enthusiastic, demonstrative and at times eloquent, quoting Latin and wandering from the text into themes entirely

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*Voted:* That Charles Sumner Esq. of Boston be appointed to instruct in the Law School until further order of this Board.

*Voted:* That he be paid a compensation for his services therein at the rate of \$1,200 a year."



foreign. He was most interesting and compelled attention and admiration.

Greenleaf was concise, clear, and confined every word to the subject of the lecture. Story magnified the Civil Law and told us of the indebtedness of the world of law to it. Greenleaf magnified the Common Law and told us of its superiority over the Civil Law. There seemed to be a sort of rivalry of these two men as advocates, one of the Civil Law and the other of the Common Law. Each would become enthusiastic and eloquent at times on these two branches of the law, and Greenleaf at one time, as I remember it, said, in substance, in speaking of Civil and Common Law. "There is no wrong that cannot be remedied and no right that cannot be enforced under Common Law procedure." As I remember his words, he further said:

"The Common Law is Christian; It has been baptized." He then gave instances in which it had been claimed that the only remedy was in the Court of Chancery under some principle of Civil Law, and he then pointed out how the remedy could be applied at Common Law. He was a marvel in ingenuity, clearness and logic, in developing a way of doing things in Common Law. It was interesting to listen to his remarkable skill. It seemed like explaining some difficult puzzle. I never listened to a man who in few words could make clear to us difficult and tangled problems.

Greenleaf asked questions at every lecture, and they were in such a way the student must understand the subject under discussion to answer it. If the answer was incorrect, or not clear, further questions were asked, in a pleasant, agreeable manner, but the student after one such questioning never forgot to be better prepared for any subsequent lecture under Greenleaf.

Story's lectures on the Constitution were, as it now seems to me, eloquent eulogies upon the men who took part in framing the Constitution of the United States, and of the men of that time who advocated different views of the provisions of the Constitution. We had text books and pages assigned for our study, but Mr. Story's lectures had very little to do with the text in the book. Occasionally Story would talk to us upon our duties as future lawyers, and he told us there was nothing inconsistent in a lawyer being learned as a scholar as well as in law. He was very emphatic in urging us to devote time to the study of Greek and Latin, and to be well furnished in literature. His eulogies were greater and more eloquent upon those who were eminent in their knowledge of the Classics as well as in law. In fact, he seemed to think that no man could be a great lawyer unless he was an expert scholar in Greek and Latin.

I remember at one time, in talking to us about our future as lawyers, he advised that we eschew all politics and devote our lives entirely to the study and practice of our profession until we had acquired sufficient wealth to live without professional labor,

and then at this point I remember very distinctly, with a sort of twinkle in his eye, he said: "Young gentlemen, when you have acquired sufficient competence to live you will not wish to engage in the turmoil, treachery and disappointments of political life."

One day a man came with Mr. Story to his lecture who attracted our immediate attention. He was a giant of a man and seemed to me to be seven feet high and well proportioned. He sat near Mr. Story and listened attentively to the lecture, and after it was over made some complimentary remark to Story about his lecture, and seemed in a cheerful, merry, conversational mood. Some of us were introduced to this giant, Jeremiah Mason. It was the only time I ever saw Jeremiah Mason, but he is in my mind now a giant in form as he was then, and has ever since been known to be a giant in law.

President Tyler and his cabinet came to Boston to attend the celebration of the completion of the Bunker Hill Monument on June 17, 1843. Harvard College in all its departments, students and officers, were given a prominent place in the procession, and a position directly in front of Mr. Webster and not far from him, at Bunker Hill. Of that celebration, the monument, the hundred thousand people, the one hundred veterans of the Revolution, the beautiful day, Mr. Webster standing with his back to the monument, the whole scene is photographed, or was photographed at the time upon my mind, and it is perfectly clear to me to-day, but the words of Mr. Webster's oration, his manner and the effect upon the audience, are all gone from me, except that part of his oration in which, turning his face to the monument he said in substance, raising his hand and pointing to the monument: "That is the orator of the day, and it will continue to speak to successive generations of men as they rise up before it and gather around it." Mr. Webster's words and his manner, as he pointed to the monument, thrilled everyone. The monument itself, every stone of its two hundred and twenty feet, seemed alive and speaking to us. That was a Websterian hour; that was an exhibition of Mr. Webster's power, seen and felt on few other occasions in his life. I can never forget it, and I never look at the monument but I feel something of the thrill of that Websterian hour.

Rufus Choate, in his eulogy of Daniel Webster, in substance, said: "If a painter could give us on canvas the scene in the United States Superior Court Room when he made his closing appeal for his Alma Mater in the Dartmouth College case, it would be one of the most touching pictures in the history of eloquence."

If a painter could give us on canvas the scene at Bunker Hill at that supreme moment, when Daniel Webster, standing on an elevated platform with one hundred veteran soldiers of the Revolution near to him and one hundred thousand people gathered on all sides of him, with faces flushed and excited, gazing at the

monument as Mr. Webster turned towards it and raising his right arm, pointing to it, spoke with such magic power as made the monument in itself move and speak; I say if such a scene could be painted on canvas it would be, not perhaps, one of the most touching, but yet one of the grandest and most effective pictures in the history of eloquence. (1)

Mr. Legaré of South Carolina, Attorney General of the United States came with the President and the rest of his Cabinet to attend this celebration and died in Boston during this visit. Immediately after his death Judge Story came to the lecture room, as we supposed to give a lecture upon some part of the Constitution. Instead of delivering the lecture, he delivered a eulogy upon Attorney General Legaré.

He gave a sketch of his life and especially of his great learning in law and his knowledge of the Classics and of Greek and Latin,

(1) Daniel Webster's oration on this occasion has been also interestingly described by George F. Hoar (then a freshman):

"The first time I remember seeing Daniel Webster was June 17, 1843, at Bunker Hill. The students of Harvard had a place in the procession. We marched from Cambridge to Boston, three miles and a half, and stood in our places for hours and then marched over to Charlestown. We were tired out when the oration began. There was a little wind which carried the sound of Mr. Webster's voice away from the place where we stood; so it was hard to hear him during the first part of his speech. He spoke slowly and with great deliberation. There was little in the greater part of that weighty discourse to excite a youthful auditor; but the great thing was to look at the greater orator. Waldo Emerson, who was there, said of him:

'His countenance, his figure and his manners, were all in so grand a style that he was without effort as superior to his most eminent rivals as they were to the humblest. He alone of all men did not disappoint the eye and the ear, but was a fit figure in the landscape. There was the monument, and there was Webster. He knew well that a little more or less of rhetoric signified nothing; he was only to say plain and equal things, grand things if he had them; and if he had them not, only to abstain from saying unfit things—and the whole occasion was answered by his presence.'

He went almost through his weighty discourse without much effect upon his auditors other than that which Emerson so well described. But the wind changed before he finished and blew towards the other quarter where the boys stood; and he almost lifted them from their feet as his great organ tones rolled out his closing sentences: 'There shall arise from every youthful breast the ejaculation—Thank God I also am an American!'"

*Autobiography of Seventy Years*, by G. F. Hoar.

See also the amusing comment of John Quincy Adams in his diary:

"June 17—This was the day of the great celebration of the Completion of the monument on Bunker Hill; and never since the existence of the three hills was there such a concourse of strangers upon their sides as has been assembled on the banks of 'Majestic Charles' this day. What a name in the annals of mankind is Bunker Hill! What a day was the 17th of June 1775! And what a burlesque upon them both is an oration upon them by Daniel Webster, and a pilgrimage of John Tyler and his cabinet of slave drivers to desecrate the solemnity by their presence! And then a dinner at Faneuil Hall in honor of a President of the United States, hated and despised by those who invited him to it, themselves as cordially hated and despised by him."

and the contributions he had made to Literature. The address was remarkable for its characterization of Mr. Legaré as a scholar and a lawyer. The most surprising part of this eulogy, an hour in length, was when for several minutes in earnest, rapid delivery and with emphasis and eloquence equal to any part, he quoted a whole page of Cicero.

I wish I could give the closing sentence of this most remarkable eulogy, but it is impossible. In substance he said, "Mr. Legaré, in addition to his masterful scholarship and achievements in literature, took the Common Law under one arm and the Civil Law under the other arm, and marched triumphantly with both."

At the close of the summer term in 1843, Story was requested to lecture on the character of some of the distinguished lawyers with whom he had been acquainted. He acceded to this request, and selected as the subject of his remarks, William Pinkney and Chief Justice Parsons. These two lectures, which were very familiar in their character, were reported by a member of the Senior class, and published in the *Law Reporter*.

October 17, 1843, Greenleaf reported that the number of students in the Law School had increased to 128, from 23 States and Territories, of whom only 40 were from Massachusetts; and that the number of students was too great to sit with convenience in either of the rooms in Dane Hall.<sup>(1)</sup> On October 25, he wrote to President Quincy, that for four years the seating capacity had been exceeded, and that for six years the shelves in the Law Library had been insufficient to hold the books.

As the funds of the School were then ample, and showed a

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(1) See *Law Reporter*, Vol. VI, p. 333, November, 1893.

"The Catalogue of Harvard University for this year contains the names of one hundred and twenty persons in the Law School. This, we presume, is the largest body ever gathered together in our country for the study of the law. A large number came from distant parts of the Union; and there are graduates of nearly all the colleges of the country. Yale College alone has sent twelve; other colleges have sent smaller numbers. We observe the names of students from Alabama, South Carolina, Ohio and Louisiana. It is in conformity with the desires of the distinguished Professors, that the Law School is not regarded as a local institution, teaching the law of a particular State, but as national in its character, and dedicated to those great rules and principles of jurisprudence, which are of equal authority in each and all of the States. Some of the technicalities of pleading may tail in practical value in Louisiana; but the rules of commercial law, as expounded by Mr. Justice Story, are of vital importance in that State. It will be interesting to our readers to know that the Judge has been restored to his former health, so that he has been enabled to resume his arduous labors, both on the bench and in the lecture room. His lectures, which are the source of so much agreeable instruction to the students of the law school, attract the attention of most strangers of distinction who visit Boston, anxious to catch the living words from this great jurist." . . .

balance of over \$20,000, the Corporation voted October 25, to refer this letter to the President, Judge Story, and the Treasurer; and on April 13, 1844, it appointed these three persons a committee with full authority to cause Dane Hall to be enlarged according to their discretion.

This improvement was at once begun in the form of an addition, at right angles to the old building, almost doubling the capacity of Dane Hall. As it was not finished until late in 1845; and as the number of students continued to increase, the Corporation voted, February 22, 1845, to give Greenleaf permission to use the Harvard Hall lecture room for his law lectures.

Early in 1844, an addition to the course of instruction at the School was approved by Greenleaf, which in the light of subsequent events, has a startling significance. Professor John N. Webster, then Erving Professor of Chemistry, had suggested that he give to the law students a course on poisons, adulterations, etc.; and on January 24, 1844, Greenleaf wrote to him (1):

They need instruction in the medical jurisprudence of insanity, also as well as in the modes of perpetrating homicide by poison and other secret means; and the knowledge of the artifices employed by bad men in adulterating and counterfeiting articles of commerce is equally essential to accomplish a lawyer in his profession.

The spring of 1844 was notable in Washington for the argument of the famous case of *Vidal v. Philadelphia* (2 Howard 127), involving the will of Stephen Girard. (2)

This case is of interest not only for the very able opinion delivered by Judge Story, but also as an illustration of the value of the Harvard Law School Library to the legal profession in those days; for one of the authorities on which its decision was based was a recent decision of Lord Chancellor Sugden (*Incorporated Society v. Richards*, 1 Dom. and War. 258), of which there was a copy in the Harvard Law Library, but none in either Philadelphia or Washington, and to which Judge Story called the attention of the counsel for the winning side, Horace Binney. (3)

The case had been first argued in 1843, by Walter Jones against

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(1) See *Harvard Coll. Papers*, 2nd Series, Vol. XII.

(2) See *The Will and Biography of Stephen Girard*, *American Quarterly Review*, Vol. XIII (1833).

(3) See *Life of Horace Binney*, by Charles C. Binney.

John Sergeant; but as Story and two other judges were absent, it was reargued in 1844 by Jones and Webster against Horace Binney and Sergeant.(1) As an example of the increase in legal facilities, it is to be noted that when a similar case was decided by Marshall in 1819 (*Baptist Association v. Hart's Executors*, 4 Wheaton 1), the *Calendars of the Proceedings in Chancery*, from which Binney in 1843 gleaned more than fifty precedents for his contention, were not even printed; and Marshall had positively stated that there was no trace whatever of any precedent(2).

Story thus described the argument, in a letter to his wife, Feb. 7, 1844:

We have been for several days engaged in Court, in hearing arguments upon the great case of the Girard will, which involves seven millions of dollars; the heirs insisting that the main bequest for building a college for orphans is void. Mr. Jones, of this city, spoke on it nearly three days; Mr. Binney, of Philadelphia, has been speaking on the opposite side (for the city) nearly three days, and has made a most masterly argument; Mr. Sergeant, of Philadelphia, is to follow on the same side, and the argument is to be concluded by Mr. Webster, for the heirs.

February 10. Saturday evening. I was here again interrupted, and for the first time am now able to resume my pen. In the case of the Girard will, the arguments have been contested with increasing public interest, and Mr. Sergeant and Mr. Binney concluded their arguments yesterday. A vast concourse of ladies and gentlemen attended with unabated zeal and earnest curiosity through their speeches, which occupied four days. Mr. Webster began his reply to them to-day, and the Court-room was crowded, almost to suffocation, with ladies and gentlemen to hear him. Even the space behind the Judges, close home to their chairs,

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(1) "When the case was carried up to the Supreme Court, Mr. Binney was joined with him at Mr. Sergeant's request, and went to England to make himself more familiar with the law of charitable cases. He returned fully prepared for the encounter. Mr. Binney was tall, large, well formed, always well dressed, and an Apollo in many beauty. He spoke slowly and distinctly; his voice was full, musical and well modulated; his manners a blending of dignity, ease, suavity and high refinement. . . . He spoke three days, during which the court room was filled to its utmost capacity by beauty, talent and eminence; lawyers of eminent abilities were drawn from Richmond, Baltimore and New York, to listen. . . . Mr. Sergeant was a lawyer of no less ability, learning and eminence than Mr. Binney; but he has not his fine voice or imposing appearance. He spoke two days. . . . Mr. Webster, who made the closing argument in the case, had a Herculean task to perform. If any one could do it, he could; but it was beyond his power. He occupied the court for three days, the room the whole time being densely crowded."

See *Public Men and Events*, by Nathan Sargeant, Vol. II (1875).

(2) See *Life of Horace Binney*, by Charles C. Binney.



*Joseph Story*





presented a dense mass of listeners. He will conclude on Monday. The curious part of the case is, that the whole discussion has assumed a semi-theological character. Mr. Girard excluded ministers of all sects from being admitted into his college as instructors or visitors; but he required the scholars to be taught the love of truth, morality, and benevolence to their fellow-men. Mr. Jones and Mr. Webster contended that these restrictions were anti-Christian, and illegal. Mr. Binney and Mr. Sergeant contended that they were valid, and Christian, founded upon the great difficulty, of making ministers cease to be controversialists, and forbearing to teach the doctrines of their sect. I was not a little amused with the manner in which, on each side, the language of the Scriptures and the doctrines of Christianity were brought in to point the argument; and to find the Court engaged in hearing homilies of faith and expositions of Christianity, with almost the formality of lectures from the pulpit.

On February 13, 1844, John Quincy Adams notes in his diary:

To escape an hour or two of soporifics, left the Hall (of Representatives) and went into that where the Supreme Court were in session to see what had become of Stephen Girard's will and the scramble of lawyers and collaterals for the fragments of his colossal and misshapen endowment of an infidel charity school for orphan boys.

Webster had just before closed his argument for which it is said, if he succeeds, he is to have fifty thousand dollars for his share of the plunder.

Story's decision in favor of the will, and against Webster's argument, was generally supported by the profession and especially by Kent, to whom Story wrote August 31, 1844:

I rejoice to know your opinion in the Girard case. The Court were unanimous, and not a single sentence was altered by my brothers, as I originally drew it. I confess, that I never doubted on the point; but it is a great, a sincere comfort to have your judgment, free, independent, learned, on it. Mr. Webster did his best for the other side, but it seemed to me, altogether, an address to the prejudices of the clergy.

Two cases in the criminal law were decided in Massachusetts, this same year, in which the Law School students took special interest and at the trials of which they attended in great numbers. The first was the famous case of *Commonwealth v. Wyman* (8 Metcalf 247), which had been twice tried in 1843, and in which Webster, Choate, Franklin Dexter, Sidney Bartlett and E.

Rockwood Hoar, had appeared as counsel for various defendants. It involved the embezzlement of \$220,000, nearly the entire capital of the Phoenix Bank in Charlestown. The sentiment of the times (not so very different from that of the present day), was noted in a comment in the *Law Reporter*, (Vol. II) :

The laxity which has grown up in regard to the public estimation of criminals, especially those who have only been guilty of fraudulent appropriation of the funds of a corporation. . . .

We may safely express a hope that the authors of this enormous fraud may meet with condign punishment . . . and yet these outrageous frauds have of late gone almost entirely unpunished in Massachusetts, and there has seemed to be no law whatever for the swindling of corporations.(1)

The other case was the trial of Abner Rogers for murder—*Commonwealth v. Rogers* (7 Metc. 500), in which George Bemis (later founder of the Bemis Professorship of International Law) and George T. Bigelow (later Chief Justice), appeared for the defendant.(2)

The opinion of Chief Justice Shaw rendered in this case, defining the law of insanity as a defence, became the foundation of the judicial, were despondent.(3)

The year 1844-45 opened with 156 students from 21 States, including the District of Columbia and Cuba, being 28 in excess of the number in any previous class. Story had for some years intended to resign from the Supreme Court Bench; and he hoped to do this at the close of Tyler's administration, in the full expectation that Henry Clay would be the next President, and that his successor in the Court might accord with his ideas. The election of Polk was a severe disappointment. Story was now sixty-five years old, the only surviving member of the "old Court"; and his views of the trend of events, political and judicial, were despondent(4). 3

(1) See *Autobiography of Seventy Years*, by G. F. Hoar; and also interesting articles in the *Law Reporter*, Vols. VI, VII, VIII.

*Argument of Daniel Wells, Esq., at Lowell, Nov. 1843, before the Hon. Charles Allen, Judge of the C. C. Pleas* (1844).

(2) See *Review of the Rogers Trial* in *Law Reporter*, Vol. VII, (1844), Vol. X (1847).

(3) His friend, James Kent, shared in these views and wrote the following to Story (See *Mass. Hist. Soc. Proc.*, 2nd Series, Vol. XIV) : "April 18, 1844—I look upon the administration of our general government as rotten to the core. Nothing can be so degrading and detestable as the conduct of the weak, vain, perfidious wretch that at present wields power to the dismay and scourge of the nation."

On April 25, 1845, he wrote:

Although my personal position and intercourse with my brethren on the Bench has always been pleasant, yet I have been long convinced that the doctrines and opinions of the "old Court" were daily losing ground, and especially those on great constitutional questions. New men and new opinions have succeeded. The doctrines of the Constitution, so vital to the country, which in former times received the support of the whole Court, no longer maintain their ascendancy. I am the last member now living, of the old Court, and I cannot consent to remain where I can no longer hope to see those doctrines recognized and enforced. For the future I must be in a dead minority of the Court, with the painful alternative of either expressing an open dissent from the opinions of the Court, or, by my silence, seeming to acquiesce in them. The former course would lead the public, as well as my brethren, to believe that I was determined, as far as I might, to diminish the just influence of the Court, and might subject me to the imputation of being, from motives of mortified ambition, or political hostility, earnest to excite popular prejudices against the Court. The latter course would subject me to the opposite imputation, of having either abandoned my old principles, or of having, in sluggish indolence, ceased to care what doctrines prevailed. Either alternative is equally disagreeable to me, and utterly repugnant to my past habits of life, and to my present feelings. I am persuaded that by remaining on the Bench I could accomplish no good, either for myself or for my country.

I meditate, therefore, to fall back on my Law Professorship, and to devote the residue of my life to its duties, hoping thereby to sustain its influence and its character. I believe the University will be ready to allow me any reasonable compensation I desire.

In the midst of this difficulty, Story was approached with the suggestion of the offer of the Presidency of Harvard College. Josiah Quincy had tendered his resignation by letter of March 19, 1845(1); and the question of his successor was of great moment

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"June 17, 1845—Sad event of your retirement from the Bench. The loss will be immense, and altogether and in any general terms, wholly irreparable—what a 'melancholy mass' it (the Bench) presents! I would not sit on that bench for all the world. I do not regard their decisions (yours always excepted) with much reverence, and for a number of the associates I feel habitual scorn and contempt."

(1) Edmund Quincy, in his *Memoir of Josiah Quincy*, says:

"When he accepted the Presidency, it was on the express understanding with the Corporation that he should not be asked to stay after the expiration of four years, if he should wish then to end his relations with the University. He had voluntarily stayed four times the stipulated term. He had more than passed the appointed age of man, yet was not his eye dim nor his strength abated. There was no apparent reason why he might

to the Law School. For, as Edward Everett, on whom the final choice fell, later said<sup>(1)</sup>: it was "the measures adopted under the active advisement and superintendence" of Quincy by which the School had been "immediately raised to the position which it has ever since maintained, at the head of the law schools of the country. Mr. Quincy's own professional studies and his long participation in political and public life led him to take a deep interest in its prosperity, as a school at once of jurisprudence and statesmanship, and to watch over it with an ever vigilant and fostering care which a President of different training and antecedents could not have been expected to bestow."

Story refused to be considered, however, deeming his Professorship "far more agreeable and useful to me, and of quite as much importance and dignity."

Thereupon the Corporation determined to make such arrange-

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not continue fit for the office for ten years longer. But he was resolved that he would leave his post when the wish was yet general that he should remain at it, and before there could be the faintest suspicion that his powers were beginning to fail him. Besides, Mr. Edward Everett was just returned from his residence at the English court. The general voice of the graduates and of the public named him as the proper person to succeed to the Presidency, whenever my father should vacate it. Mr. Everett was also my father's first and last choice. After Dr. Kirkland's resignation, and before he himself had been thought of for the office, Mr. Everett was his favorite candidate, and it was only the consciousness that it was not to be expected that so young and so able a man would be content to settle himself permanently in an academic retirement, that prevented him from pressing the nomination at that time. But now that Mr. Everett had run the career of public honors, after ten years in Congress, four in the Governor's chair, and as many in the most brilliant diplomatic position in Europe, it seemed as if the fitting time had come when he could bring his honors, his long experience, his consummate scholarship, and his rare gift of speech, and lay them cheerfully at the feet of his Alma Mater. My father resolved not to stand in the way of one whom he esteemed the man of men for the office he held. He took his measures accordingly, no one knowing his intention, excepting his family at Cambridge, until the moment of action. He called a meeting of the Corporation in Boston, and took Judge Story along with him in his carriage, who had not a suspicion of the purpose for which the meeting was called. At the meeting he gave in his resignation of his office to the Board, to take effect after the next Commencement. The Fellows were entirely taken by surprise, and at first utterly refused to entertain the proposition. At least, they would not accept his resignation until he had had some further time to reflect upon it. But he had anticipated this action, and taken his measures accordingly. That morning he had given, in confidence, a copy of his letter of resignation to Mr. Hale, of the *Daily Advertiser*, with directions to have it appear the next morning. The letter was already in type. It was too late to recall it. Expostulation would be only a waste of breath. So his resignation was perforce accepted according to its terms."

(1) See address on Commencement Day; July 20, 1864, in *Everett's Orations*, Vol. IV.

ments as to salary as to allow Story to give his whole time to his Law School work; and on April 26, 1845, on recommendation of a Committee consisting of Chief Justice Shaw and the Treasurer, the Corporation voted to allow him a salary of \$4000, the report of the Committee stating: "If objected that this compensation is high and unprecedented, and that it may operate injuriously as a precedent hereafter, we think it a sufficient answer, that the occasion is unprecedented and extraordinary." To this Story replied, on May 15, 1845:

I beg to express my personal and grateful acknowledgment through you to the Corporation for this distinguished mark of their favor, and that I now accept the proposal, to go into effect at the commencement of the academical year in August next.

I shall resign my office as Justice of the Supreme Court as soon as my present Circuit is accomplished, which I feel under obligations to complete. I had hoped that it might be finished by the first day of July next, but from present appearances it is most probable that it will occupy some weeks more. At all events, I shall resign my office early enough to devote my whole time and services to the Law School at the commencement of the next academical year. On my part, therefore, the proposal may be deemed absolutely accepted.

It will be my earnest effort to justify the liberal confidence thus reposed in me by the Corporation, by devoting my future days to the advancement of the Law School with an unfaltering diligence, and if permanent success should crown my labors, I shall deem it the highest reward which I ought to seek or desire. (1)

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(1) Chief Justice Shaw, in his elaborate Report to the Corporation, of April 1845 (*Harv. Coll. Papers*, 2nd Series, Vol. XII), after stating fully the need and value of legal education, said:

"An American law school . . . should embrace a large and liberal system of instruction in the science of jurisprudence, not for one State or section of the country only, but for the whole of the United States. Thus fitted for general usefulness, it is desirable that it should be attended by young men from various parts of the country who, having completed their classical education, either here or elsewhere, are animated by a laudable ambition to obtain largely and wisely the best means of professional training, uninfluenced by sectional preferences. Such a union of educated young men, engaged together in a course of liberal professional studies, men who afterwards distribute over all the United States, may be expected to have conspicuous and influential places in Society, and may be looked to as means of Union and harmony tending to the advancement of the common and general interests of the whole people.

In this view, it is obviously desirable to obtain for the offices of government and instruction in the Law School, gentlemen of high talents, of great learning and experience and of commanding reputation, men who have an ardent love for the profession they have adorned, who, by their example as well as by their teaching, can encourage young men to

The new addition to Dane Hall being now completed, the students determined to celebrate the event; and Francis E. Parker (1843-46) of Boston, Anthony A. Penniston (1843-45) of New Orleans, and Anson Burlingame (1844-46) of Detroit, were chosen a Committee to take charge. Accordingly, they invited the Alumni and members of the Bar generally to a festival to be held on July 3, 1845; and Story wrote to Kent, June 10:

Sixteen years have elapsed since the Law School was reorganized, upon the accession of Mr. Quincy to the Presidency of Harvard College, and we have just completed a very large addition to the Dane Law College, for a library and a lecture-room. The law students have concluded to celebrate the occasion by a discourse, to be delivered by the Hon. Rufus Choate, and a public dinner in the new Library, at which President Quincy, and other distinguished gentlemen, Judges and lawyers, will be present. Indeed, it is, in some sort, a farewell dinner to President Quincy, whose resignation takes place at the ensuing Commencement. We are all of us most anxious that you should be present with us on this most interesting occasion, probably the last great professional meeting of your life. At your age, we should not expect, or impose upon you the task of making a speech at the table, and we shall all understand, that if you will favor us with your company, you shall be exempted from any effort of this sort. Under these circumstances, we earnestly hope that you will do us the honor to give your attendance, that you may witness the prosperity of the Law in that School, where your Commentaries constitute one of the leading works of instruction, every year. Already, the Law School has numbered upwards of eleven hundred students within the last sixteen years, and we have now about one hundred and forty at the School.

I shall be most happy to have you come and stay at my house in Cambridge, where you will be received with all welcome, and

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struggle successfully with the difficulties which attend the early study of jurisprudence.

Such a guide, example, and instructor, has Mr. Justice Story eminently proved himself to be. . . .

He has been happy in having the assistance and co-operation of a learned and efficient permanent Professor; yet we are confident that his own brilliant talents, enlightened zeal and indefatigable exertions, have done much to promote the efficiency and success of the School and place it on the high eminence which it has attained. We are satisfied that he has devoted more thought and earnest personal effort to the instruction of the students than could reasonably have been expected from him, considering the circumstances under which he accepted the appointment.

The resources of the School are now large and they steadily increasing. This increase is attributable, we think, in a considerable degree to the reputation it has acquired and the advantages it has enjoyed in the useful labors of Judge Story.

have a comfortable chamber, and quiet hours for your accommodation.

This is the last year I shall be a Judge of the Supreme Court, and in the early autumn my resignation will be given in. Henceforth, I shall devote the residue of my life and energies to the Law School exclusively. I wish you, however, not to give publicity to this fact at present, as I mean, at a suitable time, as soon as my summer Circuit is finished, and the business of it is despatched, to announce it publicly, under my own name, in the newspapers.

My work on *Promissory Notes* is nearly through the press, and will all be published in this month. . . .

The celebration will be on Wednesday, the 3d day of July.

The occasion proved to be one of great hilarity. Rufus Choate delivered a finished and eloquent oration on *The Profession of the Law as an Element of Conservatism in the State*; after which a dinner was served in the Library room of the School. Judge Story presided, and after making an address, gave the first toast "The memory of Nathan Dane—the author of the ordinance of 1787—the author of the great Abridgment of American Law—the founder of the Law School—glory enough for one man in one age." Choate responded to, "The Orator of the Day. A statesman, while he is a lawyer, and *because* he is a lawyer. He is, himself, the great sublime he draws." Greenleaf responded to "The Law—a vigorous branch of the tree of knowledge—its life is sure whilst it bears one green leaf;" and gave "The institution of our country, safe in the hands of the rising generation of lawyers." Story retorted with "Professor Greenleaf—We have the best evidence of his law in his law of evidence."

Other speakers were President Quincy; Jeremiah Mason for the Massachusetts Bar; Judge John Davis of the Class of 1781; Judge Pitnam of Rhode Island; Judge Samuel Putnam for the Essex Bar; George S. Hillard, as one of the oldest members of the School present; Charles S. Daveis for the Maine Bar; and Judge Williams, late Chief Justice of the Court of Common Pleas, who gave the following toast: "The pupils of the Dane Law School—may they ever bear in mind the solemn consideration that of those to whom much is given, of them will much be required."

Letters were read from John Quincy Adams, William Anthon of New York and Dr. Oliver Wendell Holmes, the latter giving,

in medical terms, a recipe for a judicious mixture of law and medicine.(1)

Story was now enthusiastic to take up his new work in the School. He was delighted with his rooms in the new addition. He was urgent to finish his Circuit Court duties and wipe his docket clean, so that he might return with entire freedom to his beloved pupils. Such, however, was not to be his fate. The end of his busy and happy life was at hand.

On the evening of Commencement day, on his return home after the exercises, he said to his wife, according to his son's account:

"I have been a lucky fellow. There are few persons whose life has been so happy as mine." "Has it really then been so happy?" asked my mother. "Yes, very happy," he answered, "very happy." "And yet we have met with great losses. Think of the children we have lost," suggested she. "I remember them," he answered; "those sorrows were very sharp; but who can say what might have happened had they lived. I believe that God, in his good providence, has ordered all things aright. Besides, I have had great compensations for these griefs. My fame, and the praise that has been so kindly given to me, have been a great delight. What right had I to expect the prosperity and success that I have met with in life?"

It was only a few weeks later that, after a brief illness, he died, at his home in Cambridge, September 10, 1845, in the sixty-sixth year of his age.

His death came as a personal affliction to the people of Cambridge, his students, and to the entire Bar.

On the day of his funeral, September 12, all the shops of Cambridge were closed, and the entire membership of the School, all the leading citizens of the town and of Boston, and most of the Suffolk Bar, followed his hearse to Mount Auburn.

On September 11, at a meeting attended by every member of the School, these resolutions were adopted:

*Resolved*, that we receive the sad intelligence of the death of Mr. Justice Story with the profoundest sorrow, and that it is our duty as well as our only satisfaction to pay some tribute of respect to the memory of a man, whom all have regarded with admiration for his brilliant powers and unequalled learning; and whom we must ever remember for those personal qualities which

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(1) See *Law Reporter*, Vol. VIII, for full account.



make us regret his death, as the loss of an instructor and a friend; for those generous principles and that natural ardor which lent to his teachings the glow of conversation; for a temper equal, placable, and gentle, almost beyond example; for his affectionate and ready sympathy; and for that open and genial benevolence which made his presence a delight, and which leaves the memory of him, without one kind action omitted or one word to be recalled.

*Resolved*, that we wear crepe on the left arm for the space of thirty days, and that Professor Greenleaf be requested to deliver a eulogy on Judge Story before the members of the School at such time as he may designate.

*Resolved*, that a committee be appointed to consider and report on the expediency of procuring a painting, bust, statue, or other memorial of Judge Story, on behalf of the Law School.

*Resolved*, that these resolutions be communicated to the family of the deceased, with the expression of our sympathy for their sudden and irreparable bereavement.

*Resolved*, that these resolutions be forwarded to the *Daily Advertiser* (Boston), the *Tribune* (New York), and the *National Intelligencer* (Washington).

A. Burlingame, President.

M. G. Cobb, Secretary.

At a meeting of the Suffolk Bar, held in the United States Circuit Court room in Boston, on the day of the funeral, resolutions prepared by George S. Hillard and Charles Sumner, were presented by Daniel Webster with impressive remarks. Richard Henry Dana Jr., in his diary, thus described the scene:

Sept. 12. Great meeting of the Bar on the occasion of the death of Judge Story. Never did the Bar appear in such strength, and rarely have I known a more impressive scene. . . . Probably not a lawyer in the city was absent who had the physical power to come. More than half the younger members had been pupils of the judge. Among the older were faces which were unknown to the junior members of the Bar, which had not been seen in court for twenty years. Webster moved the resolutions in a dignified and feeling speech. Old Judge Davis seconded them. Then the venerable Jer. Mason moved a resolution that Mr. Webster be requested to prepare a eulogy, which Judge Sprague seconded. Chief Justice Shaw presided.

September 18, 1845, the sixty-sixth anniversary of Story's birth, Professor Greenleaf delivered, at the request by formal votes of the Corporation and of the Law School students, a

noble, impartial, and finished eulogy on his life and character. (1)  
Of this occasion Dana wrote:

Professor Greenleaf pronounced a discourse upon Judge Story before the Law School and the University. His audience, beside ladies and strangers, consisted of nearly all the officers and students of the college, over a hundred law students, and a large proportion of the Boston Bar. The discourse was written in a simple, earnest and feeling manner, and delivered in a corresponding manner. I never saw more fixed attention. When he closed, every man seemed to move in his seat for the first time.

The last time I ever saw that most amiable, single-hearted and industrious of men, Judge Story, was in his own court. During an interval in an argument I stepped up to the bench to ask whether I should make a motion. But this was not enough for him. He could not meet a pupil without a greeting. He moved from his seat, his face beamed with kindness, and he shook me by the hand in the most cordial manner, and then listened to my business. I believe this was the last day he sat in court. If not the last it was near it, for his death was about a fortnight after.

After the delivery of the eulogy, the Law Students held a meeting on September 18 and adopted the following resolutions:

*Resolved*, that the thanks of the Law School be presented to Professor Greenleaf for his able and excellent discourse on the life, character and services of Mr. Justice Story, and that a committee be appointed to request a copy of the same for publication.

*Resolved*, that Messrs. Charles E. Hooker, James H. Morton and Edward H. Welch be that committee.

In accordance with the request the address was later published. The *Law Reporter*, in a review of Greenleaf's eulogy, said:

Few men have ever lived, more worthy of unqualified and unalloyed eulogium than Judge Story. His foibles were as few and as slight as the lot of humanity will permit; and they were lost in a blaze of gifts, virtues and excellencies. . . . Professor Greenleaf's discourse is remarkable for its simplicity and quietness of tone. It is entirely free from the defects of extravagant and indiscriminate praise. . . . It is calm and conscientious. His love and reverence for his departed friend seem to have imposed it upon him as a sacred duty to exaggerate nothing and to overstate nothing.

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(1) The eulogy was largely taken from an article written by Greenleaf in the *National Portrait Gallery*.

While Judge Story made no pecuniary bequest to the College or to the Law School, his ever present thought of it was displayed in his will:

I resign my soul into the hands of Almighty God, in humble reliance upon his infinite goodness and wisdom and mercy, and in a firm belief of the resurrection from the dead and a life everlasting. . . .

My worldly estate is not large, partly because I have not felt as strongly as some persons the importance of wealth to happiness, and partly from my desire (which, upon this solemn occasion, it is not necessary to conceal,) to administer charity to those who, in the course of Providence, have been placed in a state of dependence upon my bounty. . . .

I give to the President and Fellows of Harvard College, to their use and behoof forever, the following articles, viz.:—The portrait of my late excellent friend, Mr. Chief Justice Marshall, by Harding, which was presented to me by the Chief Justice himself; the portrait of my late excellent friend, Mr. Justice Washington; my own portrait, by Stuart; the busts of Mr. Chief Justice Marshall, and also of myself, by Frazee; the bust of myself, by my son, William W. Story, with his consent; the prints of Lord Eldon and Lord Stowell, presented to me by the latter, with their glasses and frames; two volumes from and belonging to the library of President Washington, with his autograph, and other written memorandums,—one being President Washington's copy, and remarks thereon, of Mr. Monroe's *View of the Conduct of the Executive*, (edit. 1797); the other Watts's *Views of the Seats of the Nobility and Gentry in England*, (edit. 1779.) These books were presented to me by Mr. Justice Washington, as literary curiosities of no small value. I ask the President and Fellows of Harvard College to accept these as memorials of my reverence and respect for that venerable institution, at which I received my education.

I hope it may not be improper for me to add, that I have devoted myself as Dane Law Professor for the last thirteen years to the labors and duties of instruction in the Law School, and have always performed equal duties, and to an equal amount, with my excellent colleagues, Mr. Professor Ashmun, and Mr. Professor Greenleaf, in the Law School. When I came to Cambridge and undertook the duties of my Professorship, there had not been a single student there for the preceding year. There was no Law Library; but a few and imperfect books being there. The students have since increased to a large number, and for six years last past have exceeded one hundred a year. The Law Library now contains about six thousand volumes, whose value cannot be deemed less than twenty-six thousand dollars. My own salary has constantly remained limited to one thousand dol-

lars, (a little more than the interest of Mr. Dane's donation.) I have never asked or desired an increase thereof, as I was receiving a suitable salary as a Judge of the Supreme Court of the United States, while my colleagues have very properly received a much larger sum, and of late years more than double my own. Under these circumstances, I cannot but feel that I have contributed towards the advancement of the Law School a sum out of my earnings, which, with my moderate means, will be thought to absolve me from making, what otherwise I certainly should do, a *money legacy* to Harvard College, for the general advancement of literature and learning therein.

Immediately after Story's death there was a general public feeling that some official recognition should be made of his great services to the University. This was finally embodied in a report made by a Committee appointed in February, 1849, by the Board of Overseers to visit the Law School, consisting of Hon. Peleg Sprague, Hon. William Kent, Charles Sumner, Hon. Albert H. Nelson, and Peleg W. Chandler. This report, on November 7, 1849, drawn up by Charles Sumner, after stating the history and condition of the School, thus proceeds:

In reviewing the history of the School, the committee, while remembering with grateful regard all its instructors, pause with veneration before the long and important labors of Story. In the meridian of his fame as a judge, he became a practical teacher of jurisprudence, and lent to the University the lustre of his name.

It appears, from the books of the Treasurer, that the sums received from students in the Law School during the sixteen years of his professorship, amounted to \$105,000. Of this sum, only \$47,200 were spent in salaries and other current expenses of the School. The balance, amounting to \$57,200, is represented by the following items, viz.:

Books purchased for the Library and for students, including about \$1,950 for binding, and deducting the amount received for books sold.....	\$29,000
For the enlargement of the Hall, containing the library and lecture-rooms, in 1844-45.....	12,700
The Fund remaining to the credit of the School in August, 1845 .....	15,500
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	\$57,200

Thus it appears that the Law School, at the time of Professor Story's death, actually possessed, independent of the somewhat scanty donations of Mr. Royall and Mr. Dane, funds and other property, including a large library and a commodious edifice,

amounting to upwards of *fifty-seven thousand dollars*, all of which had been earned during Professor Story's term of service. As he declined, during all this time, to receive a larger annual salary than \$1,000, and as his high character and the attraction of his name doubtless contributed to swell the income of the School, it will be evident that a considerable portion of this large sum may justly be regarded as the fruit of his bountiful labors contributed to the University.

The committee, while calling attention to the extent of the pecuniary benefaction which the Law School has received from Professor Story, have felt it their duty to urge upon the Government of the University the propriety of recognizing this service in some suitable form. The name of Royall, attached to one of the professorships, keeps alive the memory of his early beneficence. The name of Dane, attached to the professorship on which Story taught, and sometimes to the edifice containing the library and lecture-rooms, and also to the Law School itself, attests, with triple academic voice, a well-rewarded donation. But the contributions of Royall and Dane combined—important as they have been, and justly worthy of honorable mention—do not equal what has been contributed by Story. At the present moment, Story must be regarded as the largest pecuniary benefactor of the Law School, and one of the largest pecuniary benefactors of the University. In this respect he stands before Hollis, Alford, Boylston, Hersey, Bowdoin, Erving, Eliot, Smith, M'Lean, Perkins, and Fisher. His contributions have this additional peculiarity, that they were munificently afforded,—from his daily earnings,—not after death, but during his own life; so that he became, as it were, the executor of his own will. In justice to the dead, as an example to the living, and in conformity with established usage, the University should enroll his name among its founders, and, in some fit manner, inscribe it upon the School which he has helped to rear.

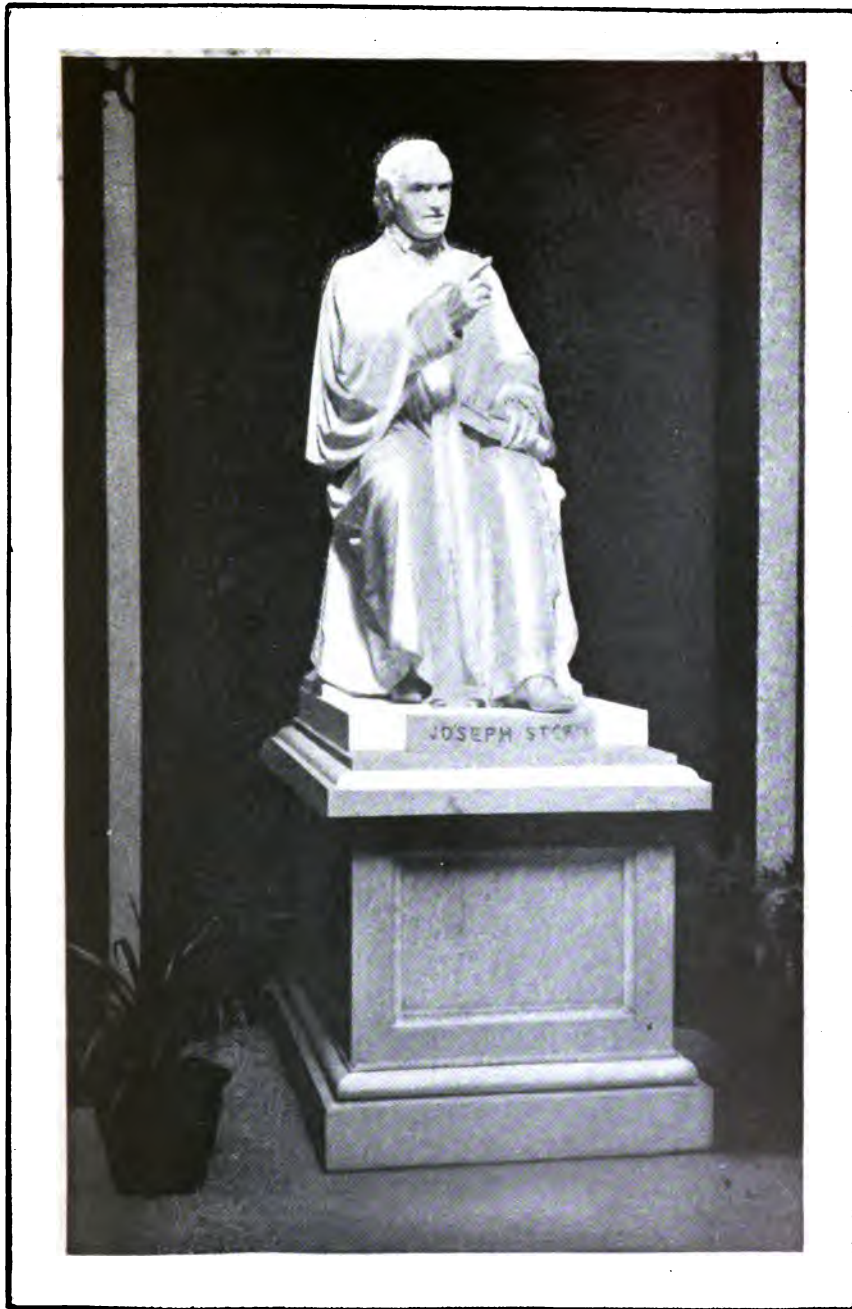
Three different courses have occurred to the committee. The edifice containing the library and lecture-rooms may be called after him, *Story Hall*. Or the branch of the University devoted to law may be called the *Story Law School*; as the other branch of the University devoted to science is called, in gratitude to a distinguished benefactor, *Lawrence Scientific School*. Or, still further, a new and permanent professorship in the Law School may be created, bearing his name.

If the latter suggestion should find acceptance, the committee would recommend that the professorship be of *Commercial Law and the Law of Nations*. It is well known that it was the earnest desire of Professor Story, often expressed, in view of the increasing means of the Law School, and of the necessity of meeting the increasing demands for education in the law, that professorships of both these branches should be established. He regarded that of commercial law as most needed. His own pre-

eminence in this department is shown in his works, and especially in his numerous judicial opinions. And only a few days before his death, in conversation with one of this committee, hearing that it had been proposed by some of the merchants of Boston, on his resignation of the seat which he had held on the Bench for thirty-four years, to cause his statute in marble to be erected, he said, "If the merchants of Boston wish to do me honor in any way on my leaving the Bench, let it not be by a statue, but by founding in the Law School a professorship of commercial law." With these generous words he embraced in his vows at once his favorite law, and his favorite University.

The subject of commercial law is of great and growing practical importance. Every new tie of commerce, in the multiplying relations of mankind, gives new occasion for its application. Besides the general principles of the Law of Contracts, it comprehends the Law of Bailments, Agency, Partnership, Bills of Exchange, and Promissory Notes, Shipping and Insurance;—branches of inexpressible interest to the lawyer, the merchant, and, indeed, to every citizen. The main features of this law are common to all commercial nations: they are recognized with substantial uniformity, whether at Boston, London, or Calcutta; at Hamburg, Marseilles, or Leghorn. In this respect they may be regarded as a part of the *private* law of nations. They would be associated naturally with the Public Law of Nations; embracing, of course, the Law of Admiralty, and that other branch which, it is hoped, will remain for ever a dead letter,—the Law of Prize.

The committee believe that all who hear this statement will agree that something ought to be done to commemorate the obligation of the University to one of its most eminent professors and largest pecuniary benefactors. They have ventured to make suggestions with regard to the manner in which this may be accomplished, not with any pertinacious confidence in their own views, but simply as a mode of opening the subject, and bringing it to your best attention. In dwelling on the propriety of creating a new and permanent professorship, they do not wish to be understood as expressing a preference for this form of acknowledgment. It may well be a question, whether the services of Professor Story,—important in every respect,—shedding upon the Law School a lasting fame, and securing to it pecuniary competence, an extensive library, and a commodious hall,—can be commemorated with more appropriate academic honors, than by giving his name to that department of the University of which he has been the truest founder. The world, in advance of any formal action of the University, has already placed the Law School in the illumination of his name. It is by the name of Story that this seat of legal education has become known wherever jurisprudence is cultivated as a science. By his name it has been crowned abroad.



Joseph Story





## CHAPTER XXVI.

### REMINISCENCES OF STORY.

The value of a great personality as an educative force has never been better illustrated than in the history of Harvard University during the administration of President Quincy and his brilliant corps of Professors. As George F. Hoar, a graduate of the College in 1846 and of the Law School in 1849, said:

A youth who contemplated with a near and intimate knowledge the large manhood of Josiah Quincy; who listened to the eloquence of James Walker or heard his exposition of the principal systems of ethics or metaphysics; or who sat at the feet of Judge Story as he poured forth the lessons of jurisprudence in a clear and inexhaustible stream, caught an inspiration which transfigured the very soul of the pupil.

Certain it is that the influence which the Law School had upon the students of those times was largely due to the personal characteristics of Story and Greenleaf; and to this influence the pupils have borne ample testimony.

Of Greenleaf's personality, an account has already been given in the extract quoted from Professor Theophilus Parsons' eulogy.

Some of his pupils now alive have described him as follows,—“a high type of old time New England lawyer—learned, logical, lucid.”—a man of concise style and clear ideas”—“revered and honored by the students”.

While somewhat reserved in his manner, his affection for his pupils was warm and was fully recognized by them; his whole time and legal knowledge were placed without stint at their disposal; and he had a quiet vein of humor, especially in his letters, which was one of the most attractive sides of his nature.<sup>(1)</sup>

Of the character of Judge Story as a man and as a teacher the best description is had in the words of his own pupils. Thus Richard Henry Dana, Jr., a student in 1837-40, wrote to W. W. Story:

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(1) Letters to the author in 1907 from J. B. Walker of Concord, N. H. (L. S. 1845-46) A. B. Gale, of Jackson, Miss. (L. S. 1847-49), Charles E. Hooker of Jackson, Miss. (1844-46).

His pupils in all parts of America, whatever may be their occupation or residence, or whatever the lapse of time, will rise up, as one man, and call him blessed. He combined, in a remarkable manner, as has been said by everybody, the two great faculties of creating enthusiasm in study, and establishing relations of confidence and affection with his pupils. We felt that he was our father in the law, our elder brother, the patriarch of a common family. We felt as if we were a privileged class, privileged to pursue the study of a great science, to practise in time in the cause and courts of justice before men, where success must follow labor and merit,—where we had only to deserve, and we could put forth the hand and pluck the fruit. The pettifoggery, the chicanery of the law, were scandals, or delusions, or accidents of other times. The meanest spirit was elevated for the time, and the most sluggish and indifferent caught something of the fervor of the atmosphere which surrounded him. If he did not, it was a case in which inoculation would not take.

You remember the importance that we attached to the argument of moot-court cases. Yet, no ambitious young man, on his first appearance, showed more interest in the causes than your father, who, as you know, had usually heard them argued before at Washington, or in his circuits, by the most eminent counsel. Saturday, you remember, is a *dies non juridicus* at Cambridge. To compel a recitation on Saturday afternoon, among the undergraduates, would have caused a rebellion. If a moot-court had been forced upon the Law School, no one would have attended. At the close of a term, there was one more case than there was an afternoon to hear it in, unless we took Saturday. The counsel were anxious to argue it, but unwilling to resort to that extreme measure. Your father said,—“Gentlemen, the only time we can hear this case is Saturday afternoon. This is *dies non*, and no one is obliged or expected to attend. I am to hold court in Boston until two o’clock. I will ride directly out, take a hasty dinner, and be here by half-past three o’clock and hear the case, if you are willing.” He looked round the school for a reply. We felt ashamed, in our own business, where we were alone interested, to be outdone in zeal and labor by this aged and distinguished man, to whom the case was but child’s play, a tale twice told, and who was himself pressed down by almost incredible labors. The proposal was unanimously accepted. Your father was on the spot, at the hour, the school was never more full, and he sat until late in the evening, hardly a man leaving the room.

Do you remember the scene that was always enacted on his return from his winter session at Washington? The school was the first place he visited after his own fireside. His return, always looked for and known, filled the Library. His reception was that of a returned father. He shook all by the hand, even the most obscure and indifferent; and an hour or two was spent

in the most exciting, instructive, and entertaining descriptions and anecdotes of the events of the term. Inquiries were put by students from different States, as to leading counsel or interesting causes from their section of the country, and he told us, as one would have described to a company of squires and pages a tournament of monarchs and nobles on fields of cloth of gold;—how Webster spoke in this case, Legaré, or Clay, or Crittenden, General Jones, Choate, or Spencer, in that, with anecdotes of the cases and points, and all “the currents of the heady fight.”

Rutherford B. Hayes (a student in 1843-45), thus describes, in his diary, Story's first lecture of the term(1):

He spoke at some length of the advantage and necessity of possessing complete control of the temper, illustrating his views with anecdotes of his own experience and observation. His manner is very pleasant, betraying great good-humor and fondness for jesting. His most important directions were: Keep a constant guard upon temper and tongue. . . . When in the library, employ yourself in reading the title-pages and table of contents of the books of reports which it contains, and endeavor to get some notion of their relative value. Read Blackstone again and again—incomparable for the beauty and chasteness of its style, the amount and profundity of its learning.

And at the end of the first week, Hayes wrote:

We have no formal lectures. Professors Story and Greenleaf illustrate and explain as they proceed. Mr. G. is very searching and logical in examination. It is impossible for one who has not studied the text to escape exposing his ignorance; he keeps the subject constantly in view, never stepping out of his way for the purpose of introducing his own experience. Judge Story, on the other hand, is very general in his questions, so that persons well skilled in nods affirmative and negative shakings of the head, need never more than glance at the text to be able to answer his interrogatories. He is very fond of digressions to introduce amusing anecdotes, high-wrought eulogies of the sages of law, and fragments of his own experience. He is generally very interesting, and often quite eloquent. His manner of speaking is almost precisely like that of Corwin. In short, as a lecturer he is a very different man from what you would expect of an old and eminent judge; not but that he is great, but he is so interesting and fond of good stories. His amount of knowledge is prodigious. Talk of “many irons in the fire”! Why, he keeps up with the news of the day of all sorts, from political to Wellerisms, and new works of all sorts he reads at least enough to form

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(1) *Life of Rutherford B. Hayes*, by William D. Howells (1876).

an opinion of, and all the while enjoys himself with a flow of spirits equal to a school-boy in the holidays. So ho! the measures of literature are not so small after all.

Of the closing lecture of the term, Hayes wrote that the students were urged to lay a broad and deep foundation of legal reading; to remember that the law was a jealous mistress, and to have nothing to do with the charmer Politics before forty; to use their young hopes, desires, confidence, ambition, and energy, only for useful and noble ends, and were assured that their master had a pride and interest beyond their conception in their future success. And at the close of his entry, Hayes exclaimed: "Pshaw! How my haste (indecent!) spoils the Old Man Eloquent!"

George W. Huston who was in the School in 1841-43, wrote(1):

Most of the law students boarded and roomed at private houses with families. They were furnished with text-books by the college, and studied at their rooms when not in class. We had daily lectures on Law from the two distinguished lawyers, and there were daily examinations of the students by questions put by these eminent professors. Twice a week we had moot court, presided over by one of the professors, at which two students were assigned on each side to discuss law questions given out by the professors. This discussion was sometimes marked by very considerable ability, as most of the law students were grown young men, many of them being graduates from the different leading colleges then to be found in America. As a rule, these young men had come to Harvard as the fountain head of legal learning, earnestly meaning to learn all they could, and but few were idlers. I recall but a single exception, and this was the son of a millionaire—there being only one in America at that time. This young gentleman, so distinguished, was a pupil—but not a student—at the Harvard Law School. He attended the lectures as the rest of us did, but cut a poor figure in class, notwithstanding he was always driven out from his magnificent rooms at the finest hotel in Boston, sitting back in his gorgeous carriage, attended by several liveried servants and accompanied by many dogs. It need hardly be said he was not popular. Boy-nature is much the same among the Harvard students of three generations ago that it is among school-boys to-day. There was only the difference that such individious distinctions were rarer then than they are now, and the feeling

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(1) See *Memories of Eighty Years*, by George W. Huston (1904).

of democracy was freshly strong and exceptionally intense, through our recent war with England. So it was that there was much general enjoyment of an incident which seemed to the indignant students to put "Mr. Millionaire" in his proper place. He knew nothing of law, but being somehow driven to look into a digest of legal decisions, he happened upon a reference to a point he wished to make. This reference was contained in the 9th volume of English Modern Reports, and the digest in referring to it made use of the familiar abbreviation—"9th Mod." And it was this that tripped up "Mr. Millionaire" and made his fellow students howl with delight when he said pompously:

"Your Honor will find it in the 9th Moderator."

"Ninth Modern, sir—not Moderator."

Saying this Professor Greenleaf tried to frown down the shouting of the class, but could not help smiling himself. And from that hour to the time he left Harvard Mr. Millionaire was known to his fellow-students as "Mr. Moderator."

Frequently important cases were argued out in our lecture room by Mr. Franklin Dexter, Mr. Sumner, and other great lawyers of that day, before Judge Story, sitting as a United States Circuit Court. Judge Story was utterly without pretensions of any kind and one of the most lovable men I have ever known. He was always in a good humor, and singularly simple-hearted, being almost childlike in his manner, and had a smile for everyone and a pleasant word ever ready for utterance. His long, well-formed head was perfectly bald, with only one little bunch of hair in front, and he had a singular habit of combing this patch of hair with a small pocket comb, even in lecture hour. It was easy to draw him away from the subject of his lecture and to lead him off into anecdotes about various great men, stories about General Washington, Alexander Hamilton, Chief Justice Marshall and others. Some of the students—all of whom were eager to hear him—would frequently thus draw him out by a pretendedly casual question. Judge Story, also full of fun and fond of jokes, was once called upon to decide an amusing matter, which occasioned some temporary and half-serious perplexity at Harvard. There was a wealthy old man, a retired tanner, then living in Cambridge Port, who was very illiterate, but who must have been a lover of education, since he had purchased, through agents in Europe, a library of ten thousand volumes, which were said to be valuable in their contents, and which were all gorgeously bound in gold leaf. He was, at all events, ambitious for literary distinction and determined to achieve it if he could. He accordingly offered to make the whole of this gorgeous library a present to Harvard College, upon the single, but explicit, condition that the College faculty would confer upon him the degree of LL.D. The governors of the College would have been pleased to add the old man's books to the library, for, as I have said, the books were understood to be

valuable inside, as well as outside. But that condition! It is scarcely probable that it was ever seriously entertained or considered but there naturally was much discussion of the proposition. At any rate, the faculty held several meetings—to laugh over the matter, most likely. At the last meeting Judge Story arose and gravely inquired:

"Should we finally accept this proposition and concede the degree—in that case—what would the letters LL.D. stand for?"

There being no answer to the question, the judge answered it himself:

"If bestowed upon this gentleman, they could not possibly stand for anything but Learned Leather Dresser." And that settled the question of the library bound in gold leaf.

. . . I was a natural lover of good books, and my life at Harvard gave me free access to the greatest library then in America. I was allowed, under proper restriction, to take books to my room, and there, pouring over the great sources of knowledge, I formed the habit of useful reading which has strengthened as the years have passed. In making frequent visits to the library I used often to see Mr. Longfellow, who was then the Professor of Literature, and whom I rarely saw elsewhere, as my studies in the Law School did not bring me in contact with him. And I always looked at him with keen interest; not because he was a great poet—for his fame came later—but because he was such a great dandy, such an exquisite in his dress and manner.

Another whom I often saw in the library was Professor Webster, who lectured on Chemistry.

As the living roll of men who studied under Story and Greenleaf rapidly diminishes, the following reminiscences from those who still survive deserve a special and valued place in this history.<sup>(1)</sup>

William R. Gorman of Paschal, Georgia, a student in 1844-45, writes:

I can never forget Judge Story's manner when he informed us that he would have to leave us for a while to go to the Supreme Court in Washington. In making his announcement he was much affected. He spoke in terms of endearment of the Law School and expressed his hope that he would not be away long. When his work was over, he hurried back to Cambridge to be again with his students; he never failed to receive a warm welcome from them. He was sure to be received with cheers, and

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(1) The author in preparing this history addressed a personal letter to every living graduate of the classes prior to 1855. The letters quoted are a few of the many replies received by him in 1907 and 1908.

this was especially so if any case had been decided which had agitated the public mind. He was always glad to get home again, and no matter whether he met them on the street or spoke to them from his platform, his words were ever kind and gracious, and he said how glad he was to see you; and the expression on his face gave ample proof that what he said was true.

Mr. Greenleaf, our instructor in common law, was in some respects different in his manner of bearing towards us, somewhat distant and reserved. He was a man of but few words, and thoroughly versed in law. When any of us asked him to explain a point we did not thoroughly understand, no man of his day or to-day could make it clearer than he could.

Moot courts were held at stated times, Judge Story presiding with as much grace and dignity as he did when on the bench at Washington. Occasionally some of the more advanced students presided. We had quite a number of distinguished visitors, John Quincy Adams among them.

Daniel Webster was occasionally with us at the time, and whenever he entered the Law School building always received an ovation from the students.

I stopped for a while with Mrs. Sawyer, corner of Pleasant Street, Cambridgeport. Later Mr. Anson Burlingame from Michigan came, and proved a valuable addition to the small coterie of friends I already had there. He was a genial fellow, and soon became very popular with the students and citizens as well.

Later I changed my boarding house and went to Mrs. Cochran's to be near the College. Among the students and people generally, I had a most pleasant and agreeable time. Socially I never had a better.

I do not consider that I have done my duty to myself, without some reference to the Professors in the University. They were courteous and very polite, especially to those who had the privilege of visiting them and their families.

Professor Longfellow held the chair of Belles Lettres in the University and was very popular with the law students. I had the pleasure of knowing him and also two of his daughters.

Professor Jared Sparks, author of the Life of George Washington, was quite an old man when I knew him, but most agreeable and interesting to those of us who called on him. He never tired of talking to those who appreciated him; I never can forget how his eyes sparkled when he talked of Washington.

Edward A. Simon of St. Martinville, Louisiana, who was in the School 1844-47, describes Greenleaf as not communicative socially to his students, rather dry, but extremely kind. Of Story, he writes that he was "worshipped by us all", and that

his lectures were "magnificently taught, interesting and eloquent, and replete with anecdote and reminiscence."

Simon also refers to the popularity of Longfellow (whom he knew personally) with the law students, and states the interesting fact that much of the portion of *Evangeline* relating to Louisiana was founded on a description given by Simon of his own home in that State.

Charles G. Hooker of Jackson, Mississippi, who was in the School 1844-46 writes:

Judge Story was much beloved by all the students, by none more so than the Southern students. I was in the School when he died and no more sincere mourners followed him to the grave than the body of students from the South.

He was plain, simple, unostentatious and without a particle of the distance of the Professor. He would often meet me on the street and taking me by the arm, say to me "Let me walk a square with you, my young brother in the profession".

He had the habit of illustrating the subject he was lecturing on by an anecdote, and sometimes, when beginning, would pause and ask "Have I told this before, this session?" Every man in the class with a pardonable lapse from truth would answer "No, sir. No, sir".

On one occasion Judge Story while lecturing to us on Agency (on which his own work was the text book), said, "I will not lecture to you next Thursday, but will invite the class to go over to Boston and hear some great lawyers argue before me in the Circuit Court." The class accordingly strolled over across the Long Bridge on the appointed day. Mr. Rufus Choate was one of the counsel, and his fondness for long sentences and magniloquent words was illustrated in this case by the fact that though it involved a pail of butter and cheese, he never referred to these articles by name, but as "products of the country".

In his argument, while Choate was citing certain varying authorities which laid down a very indefinite and commingled rule, Judge Story interrupted him pleasantly by saying, "Mr. Choate, these cases are like the colors of the rainbow which insensibly fade into each other."

Choate pacing up and down before the jury, as was his habit, and passing his long fingers through his long curly hair replied, "Yes, your Honor, or may it not rather be said to be like that peculiar period of time called twilight when no man knows whether it be day or night."

Daniel Saunders of Lawrence, Mass., a student in 1844, writes:

The two men (Story and Greenleaf) were very unlike in many



respects personally and as instructors—Professor Greenleaf, in the lecture room was more concise in statement, more analytical in the development of the law and its history—more exacting in the examination of students in the class room. He was appreciative of merit, but not tolerant of failure on the part of students when this was evidently the want of application in preparation—courteous but dignified in his personal relations with the students.

Judge Story was not only courteous but very cordial—never passing a student outside the class room without a pleasant greeting. And often in the class room he would entertain us with a most sprightly and interesting discourse which was more of a conversation and lecture, in which we would join. Sometimes he would be reminded of a case tried before him, and then we would have an interesting review of the case and the eminent lawyers employed in it. I remember a very interesting talk which he gave us upon a case in which the famous lawyer, William Pinkney, was employed, and a very interesting short biography of this lawyer. Judge Story was a most voluble talker. He concluded his remarks about Pinkney by saying, "As great a man as he was, he had one grievous fault—a fault I advise young men to guard against—he was an interminable talker." As a smile flitted across our faces, the Judge broke into a laugh and added, "It is a great fault no matter who indulges in it". The Judge's lectures were most interesting, but perhaps not so instructive as his colloquies. Perhaps this difference between the two men may be illustrated by two similar incidents which happened in the lecture room. It was reported to me that a fire alarm was sounded, during a class examination by Professor Greenleaf; and when the class began to show more interest in the fire than in class work, the Professor quietly said, "Young men, the fire department will attend to the fire and we will attend to the subject before us." . . . After a similar alarm had been sounded during a class recitation under Judge Story, at which I was present, as the engines went clanging by, we began to peer out of the windows, and our interest was so plainly shown in the matter of the fire rather than in our class work the Judge took a look out of the window himself, just as a large volume of smoke burst up from a near-by building, and said, "Run, boys, run! *Inter ignes, silent leges.*" We ran, and the Judge followed.

At a Moot Court over which the Judge presided I was assigned to argue one side of the case. As it was my first Moot Court case, I was very anxious and read up all the law I could find bearing upon it. Amongst the cases I found was a U. S. Circuit Court one decided by the Judge himself, very strongly sustaining my side. In my argument, I reserved this case as the last of my authorities, and then said, "In conclusion, I have a case which I am sure will be recognized by every court as of supreme authority, as it is the decision of the present most learned and eminent court". As I cited it, the Judge smiled at my attempted

compliment, and then said, "I thought that was good law when I made that decision, but the United States Supreme Court thought otherwise." And then, with a twinkle in his eyes, he said, "I don't know as I have altered my mind, as to its being good law, yet." (1)

Edward H. Daveis of Portland, Me., who was at the School, 1839-41, writes:

I was very fortunate in having for my instructors three eminent lawyers of the day—Charles Sumner, Simon Greenleaf and Judge Story. They were men of striking personality—who left a deep impression on my mind.

I well remember Charles Sumner, clad according to the fashion of the day, in small clothes, which well became his tall, straight, large limbed figure. I recall how genially he always greeted his class, and in how interesting a manner he presented to us the subject under discussion. Very popular with all the students, he was especially kind to me on account of his warm friendship for my father, Charles Stewart Daveis.

I also remember clearly Simon Greenleaf, an able and very accurate instructor, with, as the students said, "a wig-full of learning". I recall his pleasant laugh and the sparkle of his bright black eyes, as he told in his inimitable way one of his amusing stories, or drove home to our mind some law point with a happy hit.

The only way to get from Cambridge to Boston in those days was by an old-fashioned, red omnibus—driven by one horse and largely patronized by the students, at 50 cents for the round trip. Professor Greenleaf, in a course of lectures on Evidence was explaining one day to us the difficulty of recovering damages for accidents. By way of illustration, he said that in a case where a person in crossing a street was run down by a passing carriage, it was always difficult to secure the name of the driver—but he added, "Should such an accident occur in Cambridge, there would be no difficulty in placing the blame on the right man—for everyone knows *Mors Communis*—every one knows *Mors Communis Omnibus*".

There was the greatest enthusiasm among the students for Mr. Greenleaf and also for Judge Story—Mr. Greenleaf was considered the most accurate, and the Judge the most brilliant, teacher.

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(1) On another occasion, as related by Gen. Alexander R. Lawton (L. S. 1841-42), Story "pronounced a decision in the Moot Court, but warned the expectant bar then present that if any one of them should bring a similar case before him the next day in the United States Circuit Court, he would be constrained by a recent decision of the United States Supreme Court to decide the other way."

See *Address in Georgia Bar Association Proceedings*, Vol. I (1884).

I once quoted before Judge Story in the Moot Court, as the first recorded case of jettison,—that of Jonah—"It will be remembered on the voyage from Joppa to Tarsish, the vessel in which Jonah sailed was beset by a storm, and the captain ordered him to be thrown overboard to save the ship. Jonah's life was saved by a fish, said to be a whale; but from the formation of his jaws it was more probably a shark, known to sailors as a sea-lawyer."

The little sally at the profession made quite a laugh among the students, in which Judge Story, who always enjoyed a joke, joined heartily.

Among the students that I knew best at the Law School, were William Story, son of the judge, whom I remember as a handsome young man, with a fine figure and very bright. Richard H. Dana, a very keen lawyer, who argued well and whom I always enjoyed having as an opponent in the moot court. William I. Bowditch, a very talented fellow, who made very full and interesting reports of the cases in the Moot Court.

A custom of Story which was of great interest as well as benefit to his pupils, was to hold sessions of the United States Circuit Court, for the hearing of arguments, in his Lecture Room in Dane Hall. It is thus referred to by a student of 1844-45(1):

The next occasion when I saw David Dudley Field was when I was a student in the Cambridge Law School in the class of which Rutherford B. Hayes and George Hoadly were fellow members. Judge Story in his capacity as Federal Circuit Judge was in the habit of hearing chamber arguments in one of the class rooms. And on one of these occasion, it was bruited among the students (who were always welcome upon their occurrence) that Boston's famous Rufus Choate was to be argued against by two New York lawyers. These were soon ascertained to be David Dudley Field and Joseph T. Bosworth, afterwards judge and reporter in the Superior Court.

A student at the School in 1844, writes(2):

Mental toil told heavily upon Judge Story. At forty he began to present the appearance of an aged man, so far as polished skull and telltale furrows on the face concerned physical appearance. But the querulousness of age, its diminution of mental vigor and its loss of physical vigor, were ever absent. I had

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(1) *Reminiscences of David Dudley Field*, by A. Oakey Hall, *Green Bag*, Vol. VI (1894).

(2) *Green Bag*, Vol. IX (1897).

not enjoyed a sight of him until, as a law student, I confronted him at his professional desk. I recall that I became so impressed with his majestic presence, his genial face, his musical voice and his delightful method of conversational tutorship on that occasion, that I lost attention to that first lecture in contemplating the great jurist and in musing upon my knowledge of what he had achieved. I had taken to his house a letter of commendatory introduction from Theodore Frelinghuysen, the Chancellor of my alumnus university, and nothing could exceed the cordiality of the Story welcome in his study at his beautiful cottage residence; and yet such interviews from and with students must have become monotonous, and perhaps irksome. Such individual admiration could be always seen portrayed upon the faces of my fellow classmates as they were surveyed in the act of listening and gazing upon Story's saint-like face. His comments were interspersed with such appropriate anecdotes as was the habit of Abraham Lincoln. When he presided at the Moot Courts which he had established for the *nisi prius* practice of the students or for their views upon a stated controversy—generally patterned from some case in his circuit—Professor Story was the embodiment of geniality and seemed as pleased with the proceedings as would be a child at blindman's buff. His constant tenet to students was "the nobility and attractiveness of the legal profession." As matter of personal pride, I fancy he was prouder of his professorship than of his judgeship or authorship.

One of Story's great attractions was his remarkable power of conversation. "To talk was natural and necessary to my father," wrote his son. "His earnestness and volubility of speech and vivacious gesticulation afforded the necessary stimulation to this system and was his real exercise. . . . He did not often dine out . . . but when he did he was the life and spirit of the table. . . . He poured forth a copious stream of talk, rich in anecdote and reminiscence, sparkling with jest and raillery or flowing in a deeper channel of thought and feeling. At such times his face lighted up with the most luminous of smiles, and his clear joyous laugh provoked an irresistible response."

Again his son writes: "His conversation was not epigrammatic, condensed, witty, but abundant, genial, continuous, like a fountain, always fresh and bubbling. It was full of bright remark, and yet it was rather characterized by kindness and gaiety of spirits than by brevity and point. . . . He loved to indulge in personal reminiscences of the prominent men he had

known and of anecdote relating to politics and persons; but he disliked personal satire. . . . He was sometimes too profuse in conversation; yet, so refreshing was its abundance, so full of thought, and so full-souled and hearty, that it never wearied."

With allowance made for a son's partiality the above description is largely concurred in by all who knew Story. (1)

The following interesting letter from James Kent to his son William Kent, July 4, 1836, illustrates this side of his friend's personality (2):

Ruggles and I went on Saturday into Judge Story's Circuit Court. I was forced in, almost by duress, by Mr. Charles Sumner, the lawyer. The judge was in the midst of a law argument and giving his opinion on a point in the case. The moment he saw me, he called out to me and came down from the Bench to the Bar and shook hands with me and introduced me to the lawyers who were there arguing. Judge Davis, the District Judge, came from the Bench and sat with me, and the cause went on. There is attention and honor for you! I then went into the Supreme Judicial Court of Massachusetts, and the Judges were reading opinions. I took a seat on the front counsel bench, though invited to take a seat on the Bench. When I went out the Chief Justice, Shaw, whom I never saw before, followed me and got introduced to me. In the afternoon we all went to Cambridge, and with Judge Story to Mount Auburn. I admired and was awe-stricken with that beautiful and interesting, silent scene. Last evening Ruggles and I were at a party of lawyers, got up by Judge Davis for me, and it was interesting, though I was too much the object of attention. From Judge Davis' party we went to another one after nine, at Judge Putnam's, and that was in honor to me. Upon the whole, the scenes of 1823, are renewed with increased, rather than diminished, attention. But Judge Story's power of conversation among the hills and monuments and deep shady graves of Mount Auburn, was incomparable. He led Ma by the arm all the way, and he was eloquence, and poetry, and pathos, and feeling and tenderness, and anecdote, and boundless benignity, all personified in his

(1) Richard Henry Dana wrote in 1841 a description of a dinner at Mr. Abbott Lawrence's in Park Street, Boston, to meet Lord Morpeth, at which Harrison Gray Otis, George Ticknor and Judge Story were present, which gives another view of Story. It was evidently an occasion when the latter was not in his usual happy vein. "Mr. Otis was in his best vein and we young men could easily believe that he had been in his prime the best conversationalist in the land. Judge Story talked more, but tediously, and without the variety, brilliancy and tact of Otis—argued like a lawyer and prosed like a bookworm. Otis never forgot he was a gentleman dining out." See *Richard Henry Dana*, Vol. I, by Charles Francis Adams (1890).

(2) *Memoirs of Chancellor Kent*, by William Kent (1898).

identical person. I believe he is the most accomplished and ardent and enlightened intellect extant.

It was not alone with his equals and with his students that Story's affability and powers of conversation were marked. He had so delightful a simplicity of manner that he attracted and held the attention of all with whom he happened to be—tradesmen, travelling companions, men, women and children of all sorts.

It was one of the well recognized institutions of Cambridge to see him in the omnibus to Boston, talking with whomsoever he happened to be seated next. In the stage coaches to Washington he made friends with all travellers and entered into their interests with the greatest enthusiasm. It is related that once on the Circuits he sat on the box discussing with the coachman regarding the latter's family affairs and crops. And when, at the end of the journey, the coach stopped and he was addressed as, "Judge Story", by someone at the Inn, the coachman, in relating the episode, said: "You see he knew all about farming matters and the country so well, that I thought he was a farmer and one of us, and I had been telling him all sorts of trash about myself. When I heard him called Judge Story, I felt just as if I could have slunk through the leetlest keyhole in the universe."

"A more generous man never lived", writes his son. "His charity did not stop with his purse. He gave away freely of his labor and services, of his learning and thought. . . . Something he found to praise in all. He cherished animosity to no living being." His spirit was gay, sunny, fresh and happy, and his temper amiable—never sarcastic or disputatious, and always sympathetic. Of his delightful sense of humor many stories are told. Josiah Quincy, Jr. relates the following<sup>(1)</sup>:

The invitation to go to Washington with Judge Story did not imply any promise of attention after we arrived in that city, as he was careful to point out when I received it. "The fact is," said he, "I can do very little for you there, as we judges take no part in the society of the place. We dine once a year with the President, and that is all. On other days we take our dinner together, and discuss at table the questions which are argued before us. We are great ascetics, and even deny ourselves wine,

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(1) The whole account of *A Journey with Judge Story in Figures of the Past*, by Josiah Quincy, Jr., (1883), is of most vivid interest for its portrayal of the personality of the man.

except in wet weather." Here the Judge paused, as if thinking that the act of mortification he had mentioned placed too severe a tax upon human credulity, and presently added: "What I say about wine, sir, gives you our rule; but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply, 'All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.' You know that the Chief was brought up upon Federalism and Madeira, and he is not the man to outgrow his early prejudices."

And Edmund Quincy, in his life of his father, tells the following anecdote(1):

I have related, in telling my father's doings as President, how he never failed to set the sleepy students an example of rigid punctuality at morning chapel. He deserves the less credit for this example, however, in that he had contracted, long years before, the habit of rising every morning, winter and summer, at four o'clock, so that he had been long astir before the prayer-bell run out its unwelcome summons. This excess in early hours, however, like every other excess, brought its penalty along with it. Nature would not be cheated of her dues, and, if they were not paid in season, she would exact them out of season. Accordingly, my father was sure to drop asleep, wherever he might be, when his mind was not actively occupied; sometimes even in company, if the conversation were not especially animated, and always as soon as he took his seat in his gig, or "sulky", . . . One day, Mr. John Quincy Adams, who was addicted to the same vice of intemperate early rising, with much the same consequences, was visiting my father, who invited him to go into Judge Story's lecture-room, and hear his lecture to his law class. Now Judge Story did not accept the philosophy of his two friends in this particular, and would insist that it was a more excellent way to take out one's allowance of sleep in bed, and be wide awake when out of it,—which he himself most assuredly always was. The Judge received the two Presidents gladly, and placed them in the seat of honor on the dais by his side, fronting the class, and proceeded with his lecture. It was not long before, glancing his eye aside to see how his guests were impressed by his doctrine, he saw that they were both of them sound asleep, and he saw that the class saw it too. Pausing a moment in his swift career of speech, he pointed to the two sleeping figures, and uttered these words of warning: "Gentlemen, you see before

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(1) *Memoir of Josiah Quincy*, by Edmund Quincy.

you a melancholy example of the evil effects of early rising." The shout of laughter with which this judicial obiter dictum was received, effectually aroused the sleepers, and it is to be hoped that they heard and profited by the remainder of the discourse. . . .

To Story's qualities as an instructor, Professor Greenleaf paid this tribute in his eulogy:

As an instructor in jurisprudence, he never lost sight of his position as a judge, before whom the subjects of his lectures might again come under consideration. And while every topic of settled law was discussed in the lecture-room with his abundant learning and happy freedom, he carefully refrained from expressing an opinion upon open questions, and still more upon cases stated to him. Indeed, his sagacity in distinguishing between a real and fictitious case was so well known, that in this way he was rarely approached. In his statements of the existing law, he was remarkably clear and exact; copious and striking in his illustrations; rich in anecdote and historical reminiscence; and familiar with the peculiar characters of all the Judges in Westminster Hall, to whose judgments we are accustomed to refer. You, my pupils, and all who have had the privilege of sitting at his feet, will attest his unwearied patience and kindness in answering the various inquiries of the student; the native delight with which he expatiated upon the great doctrines he expounded, unconscious of the waning hour; his contagious enthusiasm inspiring all around him with love for the science, and cheering onward the most sluggish and disheartened to new vigor in the course.

As Story's lectures were wholly extempore and delivered without minutes, they were never confined to any set limits. The text book furnished the theme; but a chance remark at the beginning of the hour would frequently start a train of thought more or less connected with the subject which he would pursue for the whole of the remaining time. His son, W. W. Story, thus describes such a lecture:

One occasion I well remember, during the time when I was a student at the School. It was the last lecture of the term, on the Constitution, and it was not probable that the whole class would ever again meet. As my father took his seat to commence the exercise, this fact seemed to strike his mind, and he began by alluding to it. Moved, as he proceeded, by the train of thought and feeling thus accidentally set in motion, he slid into a glowing discourse upon the principles and objects of the





Dane Hall—1845-1871



Constitution; the views of the great men of the Revolution, by whom it was drawn; the position of our country; the dangers to which it was exposed; and the duty of every citizen to see that the republic sustained no detriment. He spoke, as he went on, of the hopes for freedom with which America was freighted; of the anxious eyes that watched it in its progress; of the voices that called from land to land to inquire of its welfare; closing in an exhortation to the students to labor for the furtherance of justice and free principles; to expand, deepen, and liberalize the law; to discard low and ambitious motives in the profession, and to seek in all their public acts to establish the foundations of right and truth. The hour flew by while we yet listened in silent attention to this touching, earnest, and eloquent discourse, and the clang of the bell broke it off at its culminating point. In returning home with him, I remarked how much I had been impressed with his remarks, and he answered: "I was entirely led away, and spoke without preparation. Indeed, I had not the slightest intention of saying a word of the kind when I entered the room".

And again, his son writes:

His lecture room was never dull. Whatever might be the subject it was treated with such force and earnestness, such warmth and geniality, that no one could listen without interest. The room was always crowded. No subject was so trite and stale that it did not bloom afresh at his touch. . . . So vivacious was he and so prodigal in his learning, that the fear of every newcomer was lest he should exhaust himself. Each lecture seemed an exception at first, but the stream never ceased. His own enthusiasm imparted itself magnetically to his hearers. His pupils learned by sympathy, or, to use our fine Saxon phrase—by heart. He clothed his teaching with such fascinating forms,—investing naked principles with the drapery and color of actual illustration,—sustaining the attention by continual allusions to interesting incidents and anecdotes, which he interwove with his lectures,—stimulating the ambition by eloquent appeals and exhortations, as well as by holding up as examples the lives of distinguished men with whom he had come in contact,—and arousing the timid by recounting the victories won by diligence over difficulties and discouragements,—that he who felt no quickening of the pulse, no blazing of his ambition, must have been dull and hopeless indeed.

His familiar bearing to the students invariably attached them to him. Many who had come determined not to like him, and who had been brought up to consider his political views heretical, and his constitutional opinions unsound, ended by becoming his ardent advocates and admirers. Affection begets affection. In the students he was truly interested. He always called them "my

boys," and felt towards them as if they were all members of one family with him. He was as familiar to them as if he were one of them, assuming no airs, and claiming no formal respect. Yet there was never an occasion where he received from them any but the most respectful consideration. His interest in them outlived their term as students and accompanied them into life. Earnestly he watched them in their professional career, rejoicing in tidings of their success, and sorrowing in their disappointments and failures.

In a word, he loved his position; and his never-failing vivacity; his winning smile that played lambent as heat-lightning around his varying countenance; his frank manner; his contagious, joyous, and irresistible laugh; and the fertility, unconsciousness and simplicity of his nature, endeared him to everyone within the circle of his influence, and made him as delightful in the lecture-room as in his home.

Of his personal appearance, his son gives the following description:

In his movements he was restless and impulsive, walking very rapidly, and with a quick, short step, and glancing vivaciously about him. In his youth his hair was auburn, and clustered around his head in thick ringlets. By the time he became a Judge, it began to wear away from his temples and crown, and during the latter portion of life his head, in the front and upper part, was bald, saving a slight tuft of hair on the forehead, and was surrounded behind by a thick mass of fine, silvery hair. His forehead was smooth and round, rising domelike over his prominent and flexible eyebrows, beneath which glanced two eager blue eyes. His mouth was large and full of sensibility. The muscular action of his face was very great, and its flexibility and variety of expression remarkable.

His face was a benediction. Through it shone a benign light, whose flame was fed by happy thoughts and gentle desires. His laugh was clear, hearty, ringing, and exhilarating. His voice was of the medium pitch, of great variety of intonation, and rising in the scale as he became earnest and impassioned, and while he spoke, his face was haunted by a changeful smile, which played around it, and flashed across it with auroral light.

The following description by his old pupil and firm friend, George S. Hillard, well sums up Story's whole personality (1):

About 5 feet 8 inches in height with rather broad shoulders and a compact and active figure. He was very animated in his movements, and to the last moved with the quick elastic step of

(1) See *Mass. Hist. Soc. Proc.*, 1st Series, Vol. X.

youth. His complexion was fair, his eyes were blue, and his hair in youth was auburn, but in early manhood he became bald. His mouth was large and full of expression. Of the many portraits and busts which were taken of him, there is no one which reproduces the full charm of his countenance, lighted up as it was by the readiest and most beaming of smiles, and glowing with kindness of heart and unaffected sympathy. His manners were simple, unassuming and cordial. Everything about him—his look of welcome, the warm grasp of his hand, his hearty and contagious laugh, was expressive of a happy temperament, an affectionate heart and a spirit singularly sweet and sunny. . . . He never lost a friend but by death. . . . His latest friends were the children of those who started life with him.

Every pupil who came within the sphere of his influence felt the magnetism of his presence. His glowing countenance, his earnest manner, his cordial smile, acted with kindling and animating effect upon all. . . .

In his lecture room there was nothing of formality or stiffness; everything was easy and unceremonious; the great lawyer and magistrate—too great to require any barriers to protect his dignity from a near approach—was the most familiar and playful of men. But never was there for a moment on the part of the young men who sat under his instruction the slightest expression of disrespect, never was the relation between them forgotten. His pupils felt for him a peculiar mixture of veneration, gratitude and love. He became the personal friend of all who showed a right to his friendship by their talent, industry and worth.

Perhaps the most concise tribute to him was that paid by Josiah Quincy in 1851(1):

His memory is bound to my affections by cords which death only can sever. Great as were your father's intellectual powers, those which had their origin in his heart were still greater. His manners were so courteous; his spirit in private society was so gentle; his conversational powers so extraordinary; the extent of his acquirements so wide; his knowledge so various and thorough; the readiness and even profusion with which he bestowed on his friends his intellectual possessions, at their call so great, that they rendered him to his intimates intensely interesting and endearing.

And as an example of Story's widespread friendships, outside his native land, the following tributes from English friends are especially touching.

(1) Letter to W. W. Story, August 20, 1851, in *Life and Letters of Joseph Story*, Vol. II.

T. C. Grattan, writing to Mrs. Trollope in 1841, said(1):

At Cambridge, three miles off, we have Judge Story of the Supreme Court, eloquent, deeply learned, garrulous, lively, amiable, excellent in all and every way that a mortal can be. He is decidedly the gem of this Western world.

And the noted actor, W. C. Macready, wrote in his diary, September 29, 1845(2):

A newspaper from America directed by Charles Sumner, which I joyfully opened; to be struck down with anguish in reading at the head of the column "Funeral of Mr. Justice Story." That great and good man—that dear and reverend and inestimable friend—is taken from us! *Vale, amice dilecte et reverende—vale! vale!*

Harriet Martineau, writing of her visit to the United States in 1834-35, said(3):

Our active minded, genial friend, Judge Story, found time to visit us frequently, though he is one of the busiest men in the world; writing half a dozen great law-books every year; having his full share of the business of the Supreme Court upon his hands; his professorship to attend to; the District Court at home in Massachusetts, and a correspondence which spreads half over the world. His talk would gush out for hours, and there was never too much of it for us; it is so heartfelt, so lively, so various; and his face all the while, notwithstanding his gray hair, showing all the mobility and ingeniousness of a child's. There is no tolerable portrait of Judge Story, and there never will be. I should like to bring him face to face with a person who entertains the common English idea of how an American looks and behaves. I should like to see what such a one would make of the quick smiles, the glistening eye, the gleeful tone, with passing touches of sentiment; the innocent self-complacency, the confiding, devoted affections of the great American lawyer. The preconception would be totally at fault.

The supremacy of Story's books in this country is well known. There remains only to be mentioned their great influence on the law of other countries. As a jurist of international reputation,

(1) *What I Remember*, by T. A. Trollope.

(2) *Reminiscences from America*, by W. C. Macready.

This and the Grattan letter are not quoted by W. W. Story in his life of his father.

(3) *Retrospect of Western Travel*, by Harriet Martineau (1838).

Story was the first American lawyer whose words were cited as authority outside of the United States.(1)

The publication of his *Conflict of Laws* was greeted with universal praise by the entire foreign press, and was hailed by foreign jurists as a work of the greatest importance and value. It was at once cited as authority in the English Courts. Both Lord Chancellor Lyndhurst and Lord Chief Justice Denman were reported by Mr. Justice Vaughan in a letter to Story of January 1, 1835, as greatly impressed with the *Commentaries on the Constitution, Bailments and Conflict of Laws*, and he continues, "I shall be much disappointed if they do not make frequent reference to your works as containing a mine of precious ore which will abundantly reward the pains of searching for it." His *Equity Jurisprudence* drew from Vaughan in 1837 similar enthusiastic praise.

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(1) The attitude of England towards the United States in legal matters may be judged from the following comments:

In 1820, Sydney Smith published in the *Edinburgh Review* his notorious attack on America, in which he said: "In the four quarters of the globe, who reads an American book? . . . During the thirty or forty years of their independence, they have done absolutely nothing for the sciences, for the arts, for literature, or even for statesmanlike studies of politics or political economy."

That this sweeping condemnation did not apply to legal literature in the minds of Englishmen may be seen, however, from the fact that, fourteen years previously, William D. Evans, the translator of *Pothier on Contracts* wrote in his introduction, in 1806: "Some valuable reports have been published (in America) which indicate a scientific and enlightened investigation of judicial questions, and which the lawyers of the mother country need not feel a disgrace in resorting to for assistance." The first English case in which an American decision (*Blight's Lessee v. Rochester*, 7 Wheaton 535.) was expressly cited by counsel was in 1824, when the Court of King's Bench remarked, in *Thomas v. Acklam*, 2 Barn. and Cressw. 779.

"It is a great satisfaction for us to know that this our judgment is conformable to a decision of the Supreme Court of the United States of America upon a similar question"—(See *Amer. Jurist*, Vol. VIII, October 1832).

In 1832, the English law magazine, the *Legal Observer* contained the following significant item: "We very lately congratulated our readers on the good understanding which appeared to subsist between the lawyers of this country and of America; but the strongest proof of it was given on Thursday, the 26th of Jan., when Lord Tenterden took occasion to inform the Bar that he had received four volumes of the reports of the Superior Courts of the United States, edited by Mr. Peters, and that it was his Lordship's intention to place them in the Library of the Court of King's Bench. He also stated, that although he had not been able to give much attention to the Reports, yet as far as he had looked into them, they appeared to have been decided on sound and correct principles. We have great satisfaction in recording this occurrence; and although the Courts here would probably not profess to be guided by the decisions of the Courts in America, yet we conceive the reports of them may be cited as collateral authority."—(See *Amer. Jurist*, Vol. VII, July, 1832).

Mr. Justice Edward Vaughan Williams of the Court of Common Pleas, wrote October 3, 1839:

It would be impertinent in me to mention to you, whose name has been so long known as one of the foremost in the learning of our profession, the high respect which I, in common with the rest of the lawyers of Europe, feel for your great talents and acquirements.

And the same year Mr. Justice Coleridge wrote in the same strain: English lawyers, like John William Smith, Sir William W. Follett and William Burge, also joined in the tributes of praise.

In 1841, Mr. Justice Patterson wrote referring to the *Conflict of Laws* as "a standard work to which we constantly refer in this country." Baron Gurney pronounced the *Commentaries on Agency* to be an "invaluable work"; and Baron Parke wrote in similar terms. Lord Denman, in letters to Sumner and Story, was especially commendatory of the latter's judicial and literary productions. Lord Campbell wrote in 1842, that he surveyed "with astonishment your extensive, minute, exact and familiar knowledge of English legal writers in every department of the law. Similar testimony to your judicial learning, I make no doubt, would be offered by the lawyers of France and Germany, as well as of America, and we should all concur in placing you at the head of the jurists of the present age."

James T. Austin, Attorney General of Massachusetts, on a visit to England in 1843, wrote that when he said to Lord Denman that he was delighted to come to the fountain of the Common law, Denman replied: "We must go to you, for your Judge Story has found the living spring, and pours out its waters most liberally." (1)

Edward Everett, Minister to England, writing June, 1843, at the time when it was expected that Story would visit England, described a dinner given by Lord Brougham and Lord Denman at which practically the entire Bench and leaders of the Bar had assembled to meet Story, and he continued:

For an American Judge to be daily cited in the British Courts from the highest of all, the Court of Parliament, down; and to have his books alluded to as the proof that certain branches of

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(1) *Law Reporter*, Vol. VI, p. 382 (1842).



jurisprudence, and those the nobler ones, are more extensively and successfully cultivated in America than in England, may well be regarded as an offset for the taunts of tourists and reviewers.

And Daniel Webster writing from London to Isaac P. Davis, June 24, 1839, said:

Tell Judge Story that I have not seen a lawyer or a judge who has not spoken of him and praised his writings. If he were here, he would be one of the greatest professional lions that ever prowled through the metropolis.

And Carson in his *History of the Supreme Court of the United States*, gives the following characterization of Story's labors which may well serve as the final word:

As a logician and a Constitutional judge, he must yield to Marshall, whom he far surpassed in general legal scholarship; but as the rival of Stowell in admiralty, and the peer of Kent in equity jurisprudence, as the sleepless and persistent force that urged others to the amendment and enlargement of our national code; as the Commentator upon the Constitution, as a teacher and law lecturer without an equal, as a judge urbane and benign, and as a man of spotless purity, he wrought so long, so indefatigably, and so well, that he did more, perhaps, than any other man who ever sat upon the Supreme Bench, to popularize the doctrines of that great tribunal and impress their importance and grandeur upon the public mind. (1)

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(1) Rufus Choate in his *Discourse Commemorative of Daniel Webster*, delivered at Dartmouth College, July 27, 1853, spoke as follows of the influence of Story on Webster,—a striking illustration of Story's effect upon the great men of his time.

"I reckon next to his (Jeremiah Mason's) for the earlier time of Webster's life, the influence of the learned and accomplished Jeremiah Smith; and next to these—some may believe greater—is that of Mr. Justice Story. That extraordinary person had been admitted to the Bar in Essex County in Massachusetts in 1801, and he was engaged in many trials in the county of Rockingham, New Hampshire, before Mr. Webster had assumed his established position. Their political opinions differed; but such was his affluence of knowledge already; such his stimulant enthusiasm; he was burning with so incredible a passion for learning and fame, that the influence on the still young Webster was instant; and it was great and permanent."

## CHAPTER XXVII.

### THE MOOT COURTS.

The portion of the Law School work in which Story chiefly delighted was the Moot Courts.

Gen. Alexander R. Lawton of Georgia (L. S. 1841-42) thus describes this institution, in his speech at the dinner of the Harvard Law School Association in 1886, on the Law School Day of the 250th celebration of the founding of Harvard College:

Having enjoyed the advantages of the Harvard Law School in the last days of Story and Greenleaf, you will pardon me if I am not only loyal to their memories, but also to their methods of teaching. . . .

Without referring, except in praise, to your present methods of instruction, I stand by the men and the methods of that day. . . . What a privilege to sit under the teachings of Story and Greenleaf! No man with intellect or soul could fail to appreciate it. Who that ever felt their influence can forget Story's genial manner, happy temper and charming methods of beguiling you into a love of the law.

Some of you have seen him preside at a Moot Court when he would say, "Gentlemen, this is the High Court of Errors and Appeals from all other courts in the world"; then he would add, "Tell me not of the last decided case having overruled any great principle,—not at all. Give me the principle, even if you find it laid down in the Institutes of Hindu Law."

These Moot Courts had been one of the principal features of the Law School under Professor Stearns; and his reports, before quoted, show how large an amount of time was devoted to them. Under Story and Ashmun, however, they received even greater attention. They were held in the lecture room once a week, generally on Friday, in the afternoon; a statement of facts was drawn up by the Professor the week before the argument, and two counsel assigned to each side, one from the Senior class and one from the Junior classes, each of the students in the School receiving a case in rotation, according to his standing. Later, when the numbers of the School increased so largely, it was found necessary to hold two and even three courts in a week.

Twice a year there were jury trials, the counsel being appointed by lot; and twelve undergraduates, or more often twelve Divinity School students acting as jury. On these occasions the ordinary exercises of the School were suspended; a sort of festival was held; and the contests were long, sharp and earnest.

All the students who have written of the School have uniformly borne witness to the great value which they attached to these Moot Courts and to the benefits which they received from the discussions.

Each student in attendance, whether as participant, as counsel, or in the audience, took notes of the cases, transcribing the statement of facts, the briefs and the judge's opinion generally in full. Many of these volumes of Moot Court Cases have been preserved. Some have been presented to the Law Library, and others have been kindly submitted to the author for examination. Many of them contain notes and observations by the student which throw interesting sidelights on the arguments and opinions.

From manuscript reports of his Moot Court Cases, it appears that Story took the fullest notes of all cases cited by the student counsel, and in writing his opinion he considered these authorities as carefully as if he were holding an actual court. Of Story's enthusiasm in this work, his son says that: "In all these trials my father took great delight, and his interest stimulated these young men in their efforts. He delivered elaborate oral judgments, and they, in their turn, prepared their cases with great zeal. He used to say of their arguments that they were often quite as good as and sometimes better than those of the counsel engaged in the real cases."

He entered into them with the same zest and gusto as if they had been real—nay, with even more unfeigned satisfaction. He loved to see the young, ardent minds of the students first measuring their strength in argument. There was all the interest with none of the responsibility of his judicial life."

An interesting account of a tribute paid by Story to one of the arguments made by a student, William M. Evarts of New York (L. S. 1838-39), is given by Richard H. Dana, Jr.:

The most successful speech made at the School during the whole time I was there, was made before a jury of undergraduates, Judge Story on the bench, by Wm. M. Evarts. A law argu-

ment which he introduced into it, addressed to the Court, was the most complete, systematic, precise and elegantly spoken law argument I have ever yet heard, including many arguments of our most distinguished counsel before our highest courts. Evarts' jury argument was very well done, but Wm. Davis of Plymouth, who was his opponent, did quite as well to the jury. Evarts' was the best law, and Davis' the best jury, argument I heard in the School. When charging the jury, Judge Story said he must rule the law in certain points against the defendant's counsel (Evarts) though they had been argued to him "in a manner to which I cheerfully do homage." Judge Story always complimented liberally, but never went so far as in this instance. Indeed, Evarts has been a peculiar young man at school, college, and in his professional studies. If he does not become distinguished, he will disappoint more persons than any other young man whom I have ever met with.

So greatly was Story impressed by one of Dana's own arguments in a Moot Court case that he took it to Washington "to show the judges there how his students argued and investigated such cases." (1)

On many occasions, expressions like the following are to be found in Story's formal Moot Court opinions: "The arguments of the learned counsel contain all the points and authorities in the case." . . . "This case has been admirably argued," etc.

From a bound volume of Moot Court Cases 1829-30 (now in the Harvard Law Library), it appears that the first case given out by Story was argued at the first term by Ivers J. Austin and Francis B. Crowninshield against John Codman and Charles F. Deming. (2) It was an actual case, reported in *Mason's Reports*, Vol. V. Story in his opinion said, "The case has been very

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(1) See *Biographical Sketches of Eminent American Lawyers now Living*, by John Livingston (1850).

(2) The case was as follows: A master of a ship owned by an American Merchant is ordered by his owner to go to a foreign port for a cargo. His friends at the foreign port fail him. He then takes up, on the credit of the owner, but without his authority, a cargo from a foreign merchant, and gives him bills for the amount, drawn in his own name on his owner's correspondent in London, intending to remit to him the proceeds of the cargo from another foreign port, to which he is bound to London. He advises his owner of his proceedings who notifies them. The bills are sent to London, but before the proceeds are remitted, are protested for non acceptance. Afterwards the proceeds are remitted, but before the bills are due the correspondent fails. The master is poor and is liable as the drawer of the bills; the owner is rich but will not pay. Will an action lie, by the merchant who furnished the cargo, against the owner?

well argued, but one thing has not been thought of"; and he proceeded to decide the case on this "unthought of" point.

The next case, involving a question of pleading, illustrates the manner in which Story introduced comments on the legal atmosphere and history of the day:

Lawrence is the ablest judge on the English bench after Mansfield except Buller, and Chitty is one of the ablest pleaders in London and has 30 or 40 students. The present Chief Justice is a very good pleader, one of the best in the country. I should have adhered to the old law, but now, looking at the modern practice and learned dictum in the books relating to this matter, if I was sitting in judgment, I should say the defendant ought to have demurred in the first instance and not surprised the plaintiff.

An examination of these Moot Court Case Books will afford a very good idea of the limited scope of the law of those days. Thus, in 1829-30, a large proportion of the cases given out were on the subject of agency, pleading, action on bonds, and bills and notes.

The opinions given by Professor Ashmun in cases argued before him in this year, are full of interest in showing his independence of thought. Thus, in a case of nuisance and riparian rights, he said:

Angell says that if the occupation has been but for a month yet it would have been a nuisance. Now if this is the correct principle, plaintiff must recover. Angell is not a man of much celebrity and his opinion is of no authority except from his own reasoning. He cites in support of his opinion, Blackstone; but Blackstone does not pretend to lay down positive law, only his mere impressions. Opinions are not of authority, but only opinions of judges acting with judicial authority. The case rests without any authority. Vattel is also cited, but he is speaking of a different matter. There is also a citation from Kent, but it is merely the opinion of an individual and cannot stand before the authority of a decided case.

In another case he said:

The point was never before the court for a judicial decision, and what right has any man or any succession of men, to lay down a rule for future generations when it is not before them for a judicial decision, though the opinions of Coke and such men are entitled to deference? Now there is no reason for the rule though continued for a long time.

And in another he said, "There are many authorities which I have not had time to examine, but I can pass upon it to my own satisfaction without so doing"; and again, "Still, the point admits of much doubt, and I may hold a different opinion in a week's time."

A large number of these cases given out, especially by Story, were actual cases, which had been or were to be argued before him in either the United States Circuit or Supreme Courts; and each winter he would bring on from Washington a batch of printed records for use in the School.

Thus, Feb. 16, 1845, he is found writing to Greenleaf:

Your information as to the closing Moot Courts interested me a good deal. You decided the pro-rata freight case exactly as I should have done, and it coincides with a very late one in England. . . . We have decided one this very term of great interest, and I shall bring it home for the Moot Courts. I have laid aside a number for the Moot Courts, some of which are very curious.

Manuscript notes in Story's handwriting, now in possession of Professor Greenleaf's heirs, show that in the spring term of 1842, before the decision of the United States Supreme Court has reached the School, Story gave out in a Moot Court, the famous case of *Swift v. Tyson* (16 Peters 1).

In a review by the *Law Reporter* for May, 1848 (Vol. XI) of a then recently decided case in the United States Supreme Court, *New Jersey Steam Navigation Company v. Merchants' Bank* (6 Howard, 344), in which the Steamboat Company had been held liable for destruction of property carried on its boat by an express company, the following statement is made:

We confidently deny the correctness of the decision, because we know that at the Moot Court of the Law School in Cambridge in July, 1845, the late Judge Story assigned this very case for trial, submitting the evidence which had been prepared for the hearing at Washington, and held most unequivocally that, as exclusive credit had been given to Harnden & Co., (the Express Co.,) they alone were liable.

Professor Greenleaf also followed this custom and gave out many cases arising in the Massachusetts Supreme Court, among others, in 1842, the famous case of *Ingalls v. Bills* (9 Metcalf 1), involving the liability of a common carrier for injury to a

passenger caused by a latent defect, a case which Greenleaf himself had argued and won for the defendant.

It is related that Greenleaf on one occasion prepared as a Moot Court case for argument before Judge Story in the Law School a case which he expected to argue himself in Washington. Unfortunately, Story was called away before the case was reached in the Moot Court, and, as Greenleaf used to mournfully tell the story, "He never heard that case, and I was forced to sit upon my own case."

While the cases given out by Story were apt to be confined to the subjects of commercial law, agency and equity, those assigned by Greenleaf touched on more varied lines.

A summary of the Moot Court Case Book of a student in 1842-43 gives an idea of the general course and of the colloquial comments made by the student.(1)

Beginning March 20, 1843, the cases being all before Greenleaf J., the first was an action for negligence in transporting tea in a canal boat; the next trover for a watch; the next a patent case. In a case of riparian rights in which Stuart W. Fisk and Jacob B. Jewett were for the plaintiff and Henry Shippen and Thomas C. Campbell for the defendant, the student notes in the place where the plaintiff's brief should be reported—"Fisk—Tristram Shandy—Shakespeare—Nonsense."

After this case followed cases on ejectment and base fee, contribution, bills of exchange; and an action on the case against a common carrier for injury to the plaintiff's baggage, of which the following report and comment is given by the student.

*Boyd v. Lowell Railroad Corporation*—It appeared in evidence at the trial that the plaintiff was a passenger in defendant's train of cars, his trunk or baggage being in the baggage car; that the Railroad ran for some distance through a pasture and along the margin of the Middlesex Canal—that the pasture was stocked with cattle, several of which were lying asleep on the track in the night when the injury happened—that there was no fence between the Railroad and the pasture and that the engine coming in contact with one of the cattle was thrown off the track and precipitated with the baggage car into the canal. No want of care or vigilance was imputable to the engineer who did the utmost in his power, on perceiving the danger, to stop the train. *Greenleaf, J.*—"The question now is—does this fall within act of

(1) See *Moot Court Cases*, compiled by Lewis Baldwin Parsons, loaned (1907) to the present author.

God . . . In the present case the proximate cause was brute force. Does such force fall under the exception of superhuman agency. The cattle were on the Railroad within the owner's own close and it is not liable."

*Note.* The above decision gave general dissatisfaction among the law students.

The next case was a bill in equity to enforce payment of a legacy, an actual case occurring the previous winter in South Carolina argued by John C. Adams, who later was Instructor in the School, after Story's death, and Oliver Dimon against James Smith and George W. Huston, on which the student comments, "The best argued case by a long ways since I have been in the school."

Then followed cases on partnership, warehouseman's liability, criminal law, statute of limitations, guaranty, warranty on sale of ship, bill of exchange, bankruptcy, charter party, trespass.

Another amusing comment is noted by the student on a case of trespass for injury caused by the breaking of the harness of a hired horse and gig.

At the trial it appeared that the plaintiff who lives in LaSalle Street, Cambridge, hired the gig for a drive to Waltham, and that he first drove towards Divinity Hall to take up a friend who was to accompany him, but of which intention the defendant had no knowledge, and while on his way thither, having touched the horse with the whip and the animal thereupon suddenly quickening his pace, one of the traces snapped. . . . The harness was evidently rotten but it did not appear that the defendant actually knew of its insufficiency.

*Held* by Greenleaf J. The jury ought to have decided whether the plaintiff was injured while violating his contract. . . . Without doubt he may go on any of the ordinary roads to Waltham and need not take the most travelled. Certainly he may go to any part of the neighborhood of Waltham or this place, and not violate his contract. As to what is or is not the neighborhood ought always to be left to the jury; and whether Divinity Hall was beyond the immediate neighborhood. No doubt he had as good right to start from Divinity Hall as from the stable, provided it was in the neighborhood.

*Query.* Suppose a man hires a horse and buggy expecting to take a ride with his wife, must she come down and get in at the stable for fear the buggy may get broken in going up to Divinity Hall after her? Bah!



## CHAPTER XXVIII.

### THE LIBRARY 1833-1845.

Under Story and Greenleaf, the Law Library increased rapidly in size and completeness, owing to the untiring enthusiasm of both Professors in taking advantage of every chance to add to its resources. The prosperous condition of the finances of the School was also a large factor.

The expenditure for books from 1830 to 1845 was as follows.

	<i>American.</i>	<i>Foreign.</i>	<i>Total.</i>
1830-31	\$2436.69	\$176.28	\$2612.97
1831-32	305.42	15.62	321.04
1832-33	971.24	412.05	1383.29
1833-34	813.77	104.77	918.54
1834-35	617.30	12.54	629.84
1835-36	1002.78	294.26	1297.04
1836-37	527.68	58.92	586.60
1837-38	1330.71	.....	1330.71
1838-39	2131.70	382.51	2514.21
1839-40	934.95	114.59	1049.54
1840-41	583.90	695.97	1279.87
1841-42	1658.94	480.58	2139.52
1842-43	1100.88	577.48	1678.36
1843-44	.....	.....	2234.71
1844-45	617.30	12.54	629.84

The total cost from 1817 to Aug. 31, 1846, was stated by the Treasurer to have been \$32,493.87.

After the removal of the Law Library into Dane Hall in 1832, Charles Sumner, then Librarian, reported to the Visiting Library Committee of the Overseers, July 12, 1833.<sup>(1)</sup> that it then consisted of 2,358 volumes, of which 1,554 were kept in No. 1 Dane Law College, and the remainder (being duplicates 784 in number) being kept in No. 7 (the Librarian's room). During the preceding year, 185 had been added, chiefly English and American reports. He also reported: "There are many books belonging to the Library not entered upon the Catalogue; and there are some

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(1) See *Harv. Coll. Archives, Reports to the Overseers.*

on the Catalogue which have not been in the Library since the subscriber's connection therewith, which commenced Sept. 1, 1832. Of the vols. in the Library on Sept. 1, 1832, there is but one which the subscriber now finds missing. That volume is *Greenleaf's Cases Doubted and Overruled*."

From this small collection of 2,358 volumes in 1833, the Library more than quadrupled before Story's death. The various Visiting Library Committees reported to the Overseers the number of books as follows: Jan. 15, 1835, 3,280, of which 1,259 were duplicates and text books for the use of the students; 1836, 3,580; Jan. 17, 1839, "about 4000"(1); Jan. 16, 1840, 5,415; Jan. 20, 1842, 6,600. Greenleaf reported to the Overseers the number of books, Oct. 17, 1843, as 7,610; and May 7, 1844, 7,960. The Committee reported Jan. 16, 1845, the number to be "about 8000"; and on Jan. 22, 1846, it reported 10,000 volumes. In this estimate, however, it is to be noted, are included the volumes of text books which were supplied free to students i. e., books studied in regular course. The total, therefore, includes undoubtedly two or three thousand duplicates.

As no official Catalogue of the School had ever been compiled or published, Charles Sumner was appointed, in 1833, to perform the work, which he undertook with immense zeal.

The following letter to Story Dec. 18, 1833, describes his work(2):

During last summer term, I gave considerable attention to bibliography and to a special study of our Library, as I did also during vacation. I commenced the preparation of the Catalogue with pen and ink, about a week before Commencement, continued at work for about a month during a large portion of the day, attending at the same time of course to my duties in the School and also to my regular duties as Librarian. The correction of the press . . . has taken a good deal of time from the 1st month of the term to the very last week. . . . You have asked me to make out a bill against the College. I decline doing so. . . . What I have done was done more in love of the labor and of those whom I served than of money. . . .

Your affectionate pupil

Charles Sumner.

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(1) The report stated "the addition being chiefly text books for use by the students."

(2) See *Harv. Coll. Papers*, 2nd Series, Vol. VI.

See also letter from College Librarian, T. W. Harris, to Story praising the Law Library Catalogue and suggesting \$2 per printed page as suitable compensation.

Sumner was paid \$160 for his work, and \$30 additional the next year.

The Librarians, from 1830 to 1845, were students in the School, appointed, because of their high scholarship or other deserving qualities. They were entitled to occupy, free of rent, a room in the second story of Dane Hall, and, beginning in 1839-40, received a small compensation,—\$25 in that year, \$75 in 1840-41, \$25 in 1841-42, \$75 in 1842-43, \$100 in 1844-45.

They were as follows: George T. Davis (1830-31), Wheelock S. Upton (1831-32), Charles Sumner (1832-34), George Gibbs (1834-35), Thomas N. Peirce (1835-36), Henry Chapin (1836-38), George Griggs (1838-40), William R. Woodward (1840-41), James A. Abbott (1841-43), and John G. Marvin (1843-45).

Their duties were to take general charge of the Library, giving out the books and text books to the students, and attending to their return. As, however, they were engaged during the daytime in their own studies and recitations, the janitor of the building kept a general supervision during these hours. At all times, the students had access to the full Library, there being no rail or desk to prevent the freest access to the books. With a system so loose and casual, it is surprising that so few books were lost or missing as were reported by the various Visiting Library Committees, during these years—(16, in 1835, 4 in 1836, 6 in 1842, 37 in 1845). In 1837, Greenleaf reported that, since 1828, only 23 volumes had been lost and not recovered.

After the publication of the Catalogue, an 80 page pamphlet, in 1834, it became the object of the Professors to fill the many gaps in the sets of reports and in the lists of text books; and a move in this direction was at once begun. Every year, a long list of books desired was sent by Professor Greenleaf to the College Treasurer; and in almost every instance the School finances were such as to allow of their purchase.(1)

In addition to purchases, there were many important acquisitions by gift.

Chief in importance was the magnificent bequest under the will of Samuel Livermore of New Orleans, announced to the Corporation on Dec. 31, 1833, in a letter from Thomas Haven,

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(1) In order to obtain an idea of the books so purchased reference may be made to letters from Greenleaf to Treasurer T. W. Ward in *Harvard College Archives, Letters to the Treasurer*, under date of September 4, 1833, April 20, 1834, May 25, 1835, March 8, 1836, Sept. 30, 1837, March 24, 1838, May 19, 1838, Apr. 2, 1839, Nov. 8, 1839 Mar. 7, 1840, April 29, 1841, May 20, 1841, Feb. 5, 1842, March 31, 1842, April 22, 1842, July 15, 1842.

Executor. Under this, the Law School received his whole library of Foreign Law, consisting of the works of the leading civilians and jurists of Europe, and of books of Roman, Spanish, and French Law, about 401 volumes, mostly folio, inventoried at \$6,000. President Quincy in his History of the University, in 1840, said of this library: "as a collection of rare, curious and important learning it is probably not exceeded and perhaps not equalled by any other collection of its size in America, if it be in Europe."

Samuel Livermore was born in Portsmouth, New Hampshire, in 1786, seven years after the birth of Story, and was grandson of the famous Samuel Livermore, Chief Justice of New Hampshire. He graduated from Harvard in 1804, and was soon admitted to practise before the Essex Bar—a fellow member with Story. Later, he practised in Boston. He had served as volunteer on the frigate Chesapeake in her memorable fight with the Shannon. From Boston, he moved to Baltimore, and thence to New Orleans, where he entered upon the deepest study of French and Spanish Law and the Law of Nations. He became a master of international jurisprudence, his opinions being asked for by lawyers all over the country. In 1811, he published a book on *Principal and Agent and Sale by Auction*, which, up to the time of Story's work on *Agency*, was the standard authority on the subject.

Charles Sumner was set at work preparing a Catalogue of this valuable gift; and in 1835, a supplement of the Library Catalogue, of 16 pages was issued, principally composed of the titles of the Livermore bequest.

In 1834, Greenleaf devised a scheme for enlarging the Library's collection of State statutes, the want of which he stated, in his Report of Oct. 20, 1834, "has been sensibly felt"; and he suggested "the expediency of an application to the Legislature of Massachusetts for a copy of the Statutes of each State, in all cases where the Commonwealth now has or may hereafter receive triplicate copies; and the adoption of some measures to induce all the other States to send three copies of their statutes, in future annual distributions."

On April 26, 1835, Greenleaf reported that his application to the Governor and Legislature of Massachusetts had been successful, and that a standing regulation had been passed under which a quantity of books and pamphlets had been received, which,

when bound, would amount to 100 volumes. In 1836, the Visiting Library Committee reported the deposit of 176 volumes of these State statutes; and in May, 1836, Greenleaf reported the passage by the Legislature of a second resolve for depositing in the Law Library, subject to public order, all statutes of other States then in the State Library, except one copy.

On July 27, 1834, the Corporation, on recommendation of Story and Greenleaf voted to allow the transfer of 23 books and sets of reports from the College Library to the Law Library, thus still further emphasizing the distinct existence of the two separate institutions(1).

Greenleaf in his Report of May 1, 1838, said: "No catalogue is known to exist of the books transferred from the General Library to the Law Library". In 1836, the Visiting Library Committee reported gifts of 30 volumes from Story, 9 volumes of the original manuscripts of Dane's Abridgment, and 2 folio volumes of manuscript reports of cases of the time of Elizabeth and James I, presented by J. J. Wilkinson of the Temple, London, a friend and correspondent of Story.(2)

(1) The vote was as follows:

"A list of books which Judge Story and Mr. Greenleaf recommend to have removed to the Law Library (dated May 8, 1834) was read and thereupon it was *Voted* that the works mentioned in that list be removed from the College Library in Dane College—the Librarian taking Professor Greenleaf's receipt therefore.

The List is as follows—

*Atwood's Jus Anglorum ab Antiquo.*  
*Bacon's Office of Constable.*  
*Bacon's Abridgment of the Law, 5 Vols. folio.*  
*Bochmere's Electra Juris Civile.*  
*Brooks' Bibliotheca Legum Angliae.*  
*Brooks' Reading on Magna Charta.*  
*Chardon's Code des Prizes.*  
*Clayton's Reports.*  
*Codin's Oeuvres.*  
*Codex Theodosianus.*  
*Dramer's Observationes Juris Universi.*  
*Eden's Jurisprudentia etc. Juris Civilis.*  
*Gayll's Practicarum Observationum.*  
*Grotianus' Disceptationes Forensium Judiciorum.*  
*Kirby's Reports.*  
*Madox on the Exchequer..*  
*Recopilacion des Leges de los Reynos de las Indias.*  
*Schneidt's Thesaurus Juris Franconia.*  
*Simpson on the Study of the Law.*  
*Stryckius' Opera.*  
*Ustarez on Commercial Law of Spain by Kippox.*  
*Wilkin's Leges Anglo-Saxonico.*  
*Wolff on the Law of Nature and Nations.*

(2) Story wrote to Wilkinson Dec. 29, 1835:

"The two MSS. volumes of Reports, I have, according to your direc-

On May 20, 1837, Greenleaf reported that "the Law Library has been adorned recently with a fine portrait of Chancellor Kent, (painted by A. B. Durand) presented by friends, and also a portrait of the late William Johnson of South Carolina, late Justice of the United States Supreme Court, by one of his pupils".

January 20, 1842, the Visiting Committee recorded a gift to the Library from Greenleaf of "the manuscript copies of records pertaining to his own Reports", and a gift from Charles Sumner of three volumes of English briefs.

Of the condition of the Library, in general, the following accounts were given. In May, 1836, Greenleaf reported:

The Law Library is in good preservation but it is to be regretted that the state of the funds will not yet enable us to complete the collection of American Law as the honor of the Institution as well as the interest of the students, would seem to require. It is also desirable that the series of the public statutes of Great Britain should be complete up to the present time.

Aug. 9, 1837, he reported that the number of text books had been considerably increased to meet the increase in the number of students, and he continued:

The Law School is frequented by gentlemen from all parts of the Union. It is very important not only to the interests of the Institution but to those of the students that the Library should contain all the statutes and reported decisions of each, as well as the books on foreign law which are regarded as authorities in any State, so that every student may be enabled to study the jurisprudence of his own State with as much advantage here as at home. But in this apparatus, the Library is still quite too deficient.

In 1840, the Visiting Committee reported, Jan. 16, that "a semi-annual examination of the Library is made in each of the vacations" by the Librarian.

In 1841, a second edition of the Library Catalogue was issued of 154 pages, with 69 pages of a systematic index, and a preface by William R. Woodward (L. S. 1840-41), Librarian.

In 1842, the Visiting Committee reported:

tion, placed in the Law Library of Harvard University; and I have written in them a suitable mem. of the giver and the gift. Herewith, you will receive an acknowledgment from my brother Professor (Greenleaf), a most excellent man and a most excellent lawyer."

The books imported during the past year with those already in the library now enable the student to verify every citation in *Blackstone's Commentaries*, and nearly complete the collection of European Law both British and Continental from the earliest period down to the 16th Century, discovering to the student all the sources of modern jurisprudence. Some very valuable additions have also been made in Asiatic Law particularly those in use in the British East Indian Empire. The collection of modern codes of Continental Europe is more ample than any other known to exist in this country.

In 1843, Oct. 17, Greenleaf reported :

The recent addition of George Stanton's translation of the *Digest of the Laws of China* in one volume quarto enables us now to refer to a respectable part of the laws of every civilized nation in the world except Russia, Turkey and Persia.

On Jan. 16, 1845, the Visiting Committee reported :

The Librarian adds that it is yearly enriched with all the State and English reports together with elementary treatises thus affording the very best facilities for the study of jurisprudence and the most ample repository of law in the Union.

Not only was it true that the Harvard Law School Library at this time surpassed every other law library in the United States ; but it also was a fact that no law library in England or on the Continent was its equal in scope. And Greenleaf proudly reported Oct. 21, 1845 :

The Law Library, by comparing its Catalogue with those of foreign libraries so far as we have received them, is found to exceed any other known to us, in extent of its range, and the variety of foreign laws which it comprises, though several others exceed it in numbers of volumes.

## CHAPTER XXIX.

### COURSES, GROWTH AND FINANCES 1833-1845.

The scope of the Law School as an educational institution was set forth in the Catalogue of 1830 and in all the Catalogues and Circulars of the School until 1845 (and indeed to 1870), practically as follows:

The design of this Institution is to afford a complete course of legal education for gentlemen intended for the Bar in any of the United States, except in matters of mere local law and practice; and also a systematic, but less extensive course of studies in Commercial Jurisprudence, for those who intend to devote themselves exclusively to mercantile pursuits.

No admission examinations were held; and the student, on entering, received an assignment to one of the three classes (two prior to 1833-34) somewhat arbitrarily determined by his apparent qualifications or previous study.

The instruction given was chiefly by means of lectures, Greenleaf's being of a formal character and usually written; Story's methods being freer, and his lectures always oral.

In a letter to an English correspondent, May 15, 1844, Story thus described the "Harvard System" of that day:

Our system of instruction is not founded upon written lectures, (which, I am persuaded, is a very inadequate mode,) but upon oral lectures connected with the daily studies of the students in the various works which they study, and in the lecture-room where they are all assembled in classes, and where they undergo a daily examination; and every lecture grows out of the very pages of the volume which they are then reading. In this way difficulties are cleared away, additional illustrations suggested, new questions propounded, and doubts raised, and occasionally authorities criticized, so that the instructor and the pupil move along *pari passu*, and the pupil is invited to state his doubts, and learns how to master his studies.

Story's son, W. W. Story, who was in the Law School 1838-41, describes his father's method of teaching as "by familiar discourse and conversational commentary:"



A stated portion of some text-book was allotted at every exercise as the subject to be treated at the next meeting. In this the students prepared themselves. My father commenced by making general remarks upon the subject, and sketching broadly the principles applicable to it. Questions were then proposed to the students, who, in turn, whenever any difficulty presented itself, freely questioned the professor. The recitation was not at all confined to the text-book; but the general principles laid down in it formed the theme of a full and free commentary, in the course of which their various modifications and exceptions were brought out, and copiously illustrated in every shade of differences. The book constituted merely the starting-goal, from which wide excursions were made into every cognate province of the law, from which matter for elucidation, ornament, or interest could be gathered. My father's untiring enthusiasm, his copious learning, and his extraordinary fluency, enabled him to carry out this plan with comparative ease to himself.

In each of the Annual Reports of the President, from 1833-34 to 1845-46, appeared substantially the following announcement:

The course of instruction in the Law School is as follows:

(1) Lectures by the Dane Professor of Law on the Law of Nature and Nations, and on Chancery, Commercial, Civil and Constitutional Law. Lectures by the Royall Professor on all the branches of the Common Law.

(2) Reviews and examinations of the students in the Text Books. These are held twice a day, four days in the week, and four times on Fridays; and the time occupied with each class varies from one to two hours. The course of study embraces a selection of the best elementary works in each branch of the law and is intended to be completed in two years. The students are referred to a series of leading cases in the English and American Reports, and to a parallel course of reading, in addition to the prescribed course of study.

(3) Moot Courts, for the arguing of questions of law. These are held every week by one of the Professors. Four of the students in rotation appear as counsel. They begin to take their turn at the commencement of the second year of their studies. They have extempore disputations and debates on legal and miscellaneous questions as voluntary exercises.

(4) Written dissertations on subjects connected with the course of study are occasionally rendered.

(5) The students are instructed in the practice of the courts, in the preparation of pleadings, and other legal instruments; and an opportunity is afforded for attending the sittings of the State and United States Courts.

From 1830-31 to 1838-39 inclusive, the official statement was

made that the course was intended to be completed in three years. The change was made to two years, in the Report of 1839-40.

The course of text book reading, both for the regular and parallel courses, as set out in the Catalogues and Presidents' Reports from 1833 to 1845, continued on the same general lines as from 1830 to 1833 (See Chapter XXI *supra*). The course, however, became gradually more elaborate; as new text books were published, they were added or substituted for old ones—a full list of the changes being given in the note below (1). The course was remarkable for the scope of reading outlined. In addition to the routine subjects studied, the student was expected to be familiar with works of a political and ethical nature. Great weight was

(1) In 1833-34, *Story on Conflict of Laws* was added to the regular course, and starred, as required for the two year course. *Angell and Ames on Corporations* and *Adamson on Ejectment* were also starred.

In 1836-37, *Domat's Civil Law* and *Wheaton on International Law* were added to the regular course and *Hoffman's Course of Legal Study* was placed in the parallel course.

*Stearns on Real Actions* and *Adamson on Ejectments* (being more or less out of date) were no longer starred.

In 1837-38, *Justinian's Institutes and Pandects*, *Torilliers' Droit Civil Francais* and *Louisiana Code of Practice and Civil Code* were added to the regular course; and *Cooper's Pleadings* put in the parallel course.

In 1838-39, *Hoffman's Legal Outlines*, *Story on Equity Jurisprudence* (starred), *Pothier's Commercial Treatises*, *Pothier on Obligation* and *Pothier on Contract of Sale* were placed in the Regular Course. *Lieber's Political and Ethical Hermeneutics*, *De Lolme on the English Constitution*, *Moreau and Carleton's The Partidas* were placed in the parallel course.

In 1839-40, *Walker's Introduction*, *Niebuhr's History of Rome*, *Irving's Introduction to the Civil Law*, *Foucher's Codes*, *Hoffman's Chancery Practice*, were added to the parallel course; *Gibbon's Roman Empire* was added to the regular course.

In 1840-41, *Fell on Guarantee*, *Holt's Law of Shipping*, *Collyer on Partnership*, *Lawes on Charter Parties*, *Chance on Powers*, *Sugden on Powers*, *Calvert on Parties*, *Gresley on Evidence in Equity*, *Wigram on Wills*, *Wigram on Discovery*, *Corpus Juris Civilis*, *Vattel's Law of Nations*, were added to the regular course.

*Story on Agency*, *Story on Partnership*, *Greenleaf on Evidence*, *Starkie on Evidence* were added to regular course, and starred; *Roscoe on Criminal Evidence*, *Institutes of Spanish Law*, *Van Leemen's Commentaries on Dutch Law*, *Loma's Digest*, *Leigh's Nisi Prius*, *Edwards on Receivers*, *Gilbert's Forum Romanum*, *Grotius on the Law of War and Peace*, *Pufendorf on the Law of Nations*, *Phillips on Evidence*, *Watson on Partnership*, were added to the parallel course:

In 1841-42, *Story on Bills of Exchange* was added to the regular course and starred; and *Roscoe on Bills* was added to the parallel course.

In 1844-45, *Pitman on Principal and Surety*, *Stephens' Nisi Prius*, *Story on Contracts*, *Story on Promissory Notes* (starred) *Domat's Civil Law*, *Makeldey du Droit Romain*, *Pothier's Commercial Treatises*, *The Spanish Partidas* were added to the regular course. *Crabbe's History of English Law*, *Spences' Inquiry*, *Best on Presumptions*, *Wilkinson on Shipping*, *White's New Recopilacion of the Laws of Spain* were added to the parallel course.

attached to the study of Constitutional Law; and Judge Story's predilection for Maritime, Mercantile and Foreign law is seen in the large number of books of French, Spanish and Continental Law, added from year to year, in the regular and parallel courses.

The general methods of instruction can be gathered from the following extracts from the semi-annual reports made by Greenleaf to the Overseers.

May 2, 1840, he reported that study was then in four classes. Each Professor had charge of two classes, giving three oral lectures or recitations of one hour each to each class—six, every week. Greenleaf attended on Mondays, Wednesdays and Fridays from 9 to 10 A. M. and from 10 to 11; and Story, on Tuesdays, Thursdays and Saturdays from 11 A. M. to 12 noon, and from 12 noon to 1 P. M.

"The books at present studied with the Royall Professor are *Cruise on Real Property* and *Kent's Commentaries*, to be followed by *Chitty on Contracts* and *Story on Bailments*.

Those studied with the Dane Professor are *Story on Equity*, *Abbott on Shipping*, to be followed by *Story on the Constitution*." Oct. 20, 1840, Greenleaf reported that recitations and lectures had been increased from eight to twelve, of which each Professor had six. In addition, "Story had two extra recitations on *Story on the Constitution*, and Greenleaf attended a class in extra exercises in practice of drawing up pleadings". The books then studied in regular course were *Marshall on Insurance*, *Story on Equity*, and *Chitty on Pleading and Practice*.

May 4, 1841, Greenleaf reported that the books then studied were *Story on Agency*, *Story on Equity*, *Story on the Constitution*, under Story's tuition, and *Kent's Commentaries* and *Cruise on Real Property* under Greenleaf; and that Story, in addition to his two classes, had an extra class on the Constitution.

Oct. 19, 1841, he reported that each Professor was giving two extra lectures a week, owing to the great increase in number of students.

May 3, 1842, he reported that, on the average, three extra lectures a week were given "for the sake of further aiding the progress of the students, which are as well attended as the regular exercises". He also reported the introduction into the regular course of *Story on Partnership* (in place of Gow's treatise) and *Greenleaf on Evidence*, then just published (in place of Starkie's

treatise). It is to be noted how large a proportion of the text books studied were the work of the two Professors.

May 7, 1844, he explained in his Report that: "When one Professor is absent, the other gives lectures in his stead in his own studies so that there is no loss of lectures by reason of absence. The lectures thus omitted by the absent Professor are generally made up by him at extra hours after his return."

Oct. 15, 1844, he reported the addition, during the present term, of six or eight more lectures by Story, owing to the fact that the Supreme Court sessions were to begin earlier than usual (in December instead of January). In Story's absence, Greenleaf was to deliver twelve lectures a week.

#### DEGREES.

The regulation as to conferring degrees remained until 1834, as it had been under Professor Stearns' régime.

The Catalogue for 1829-30 contained for the first time the Circular of the School; and the rule regulating degrees, as there set down, was: "Gentlemen who are graduates of a College will complete their education in three years. Those who are not graduates will complete it in five years."<sup>(1)</sup> This was in conformity with the rule of the Bar of Massachusetts and some other States,—a rule recognized by the Courts, which admitted to practice on the recommendation of the Bar—by which graduates were required to study three years, and those who were not graduates, five years, before admission. And under this Law School regulation, students who commenced study in the School, and pursued the full course of two years, did not obtain the degree until they had studied the remainder of the term, either in the School or elsewhere.

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(1) See *President Eliot's Annual Report for 1875-76*:

"For five years, this was the avowed policy of the School; but, in the Catalogue for 1834-35, the sentence just quoted no longer appeared; and in its stead the following announcement was made: "The degree of Bachelor of Laws is conferred by the University on students who have completed the regular term of professional studies required by the laws or rules in the State to which they belong, eighteen months thereof having been passed in the Law School of this institution." From this position the School gradually declined by a series of small descents, until, in 1869-70, all persons who had been eighteen months in the School were entitled to the degree of Bachelor of Laws without examination or inquiry of any sort into their attainments. The rapid rise of the School from this humiliating position during the past seven years gives strong assurance that, in due time, it will return substantially to Judge Story's original policy."

As the Bar Rules of the various Counties in Massachusetts required that before admission to the Bar the applicant should have pursued his studies during the preceding year in the office of some counsellor within the County, in order to comply with this rule, it was the custom to term study at the Law School as study in the office of the Professors, in their capacity as counsellors. As this would require the students, however, to apply for admission to the Middlesex County Bar, instead of to the Suffolk County Bar where many of them desired to be admitted, Judge Story and Professor Ashmun, in August, 1830, made formal application to the Suffolk County Bar to have the rule relaxed, so as to allow admittance of Harvard Law School students to the Bar of that County. They pointed out that the Law School was not a local institution, that it had received the approbation and encouragement of the profession, and that the operation of the rule on students coming from all over the State was a hardship. (1)

(1) See letter to the President of the Bar of the County of Suffolk, August 1830, in possession of Charles P. Greenough, Esq.:

"In behalf of the Law School in Harvard University, we take the liberty of addressing some remarks to you in reference to rules regulating the admission of Attornies in your County, with a request that you would lay them before the gentlemen of the bar. The establishment of this school and the general course pursued in it are believed to have received the approbation and encouragement of the profession at large; and the growth and success of it have been such as to afford great confidence that it will become a permanent institution, sufficiently important to bespeak your interest and attention.

The particular rule to which we would allude is the one which requires that every gentleman applying for admission to the Bar should have pursued his studies during the preceding year in the office of a counsellor of the Supreme Judicial Court within the county where the application is made. The students at this school came not only from many different states, but from many different counties in this state. Many of them find it convenient or think it advisable to spend their last year here, and some will find it impossible to spend any other.

It is obvious that to such the rule in question must be the source of frequent inconvenience and embarrassment; and the purpose of this communication is respectfully to suggest for the consideration of the bar the expediency of such a modification of the rule as shall remove this inconvenience. This institution is not local: We have hoped that it would be considered, like the University to which it is attached, not as pertaining in any manner to the county of Middlesex, but as belonging to the whole Commonwealth—as an universal and common interest of the profession.

The rule in question was probably once in force in every county. In many it continues to be rigidly adhered to—but in some it has been partially disregarded, and in several it has become entirely obsolete. In its true spirit and object we presume it would not apply to the case of students at a public institution like this. In its operation upon them it becomes unequal: Since those who apply for admission in the county of Middlesex have, from its accidental location, an advantage and exemption which others do not enjoy.

It may be remarked also, that as a general rule, it must be in a great

The first change in the requirements for a degree from those established at the opening of the School was made by vote of the Corporation, Nov. 29, 1834. As the students were coming more and more from States outside of Massachusetts, and as the School was becoming increasingly national in character, it was now found that the old requirements were much too local, being limited to rules as to admission to the Bar prevalent in Massachusetts alone. Accordingly the following vote was passed:

On the representation of the Law Faculty it was  
*Voted* that the 6th Art. of the Regulations of the Law School, which is in the following words viz.:

"As an excitement to diligence and good conduct, a degree of Bachelor of Laws shall be instituted at the University, to be conferred on such students as shall have remained at least eighteen months at the University School and passed the residue of their noviciate in the office of some counsellor of the Supreme Court of the Commonwealth, or who shall have remained three years, or if not graduates of any college five years, in the School, provided the Professor having charge of the same shall continue to be practitioner in the Supreme Judicial Court" be repealed and the following substituted:

Art. 6. As an excitement to diligence and good conduct, the degree of Bachelor of Laws shall be conferred on all students who shall have studied at the Law Institution of this University for the period of eighteen months, and shall receive a certificate thereof and of their good conduct from either of the Professors of Law, and shall have studied the residue of the time necessary for their admission to the Bar of the State to which they belong or in which they intend to practice. (1)

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measure ineffectual and can have no steady or uniform operation. By the regulations of our courts and the courtesy and practice of the Bar, gentlemen admitted in any county of the Commonwealth become immediately entitled to practice throughout the whole, and to establish their residence wherever they please, on equal footing with all others. The only operation of the rule, therefore will be to compel applications to be made in the county of Middlesex instead of the counties where gentlemen respectively used to reside.

(1) The following is a form of the certificate to the Board of Overseers given under this vote, by Professor Greenleaf August, 1836, to qualify the men for degrees.

"I hereby certify that the following named gentlemen have completed the regular term of legal studies required by the laws and rules of the States to which they respectively belong and that 18 months thereof have been passed in the Law School of this Institution whereby they are entitled the degree of Bachelor of Laws."

See *Harv. Coll. Papers*, 2nd Series, Vol. VIII.

A further slight change was made by the Corporation Jan. 3, 1839.

*Voted* that the degree of Bachelor of Laws will hereafter be conferred on all students who have completed the regular term of professional studies required by the Laws of the State to which they belong or where they intend to practice, and who have passed eighteen months or three terms at the Law School of the University, and shall be recommended therefor by the Law Faculty.

This, however, still left an inequality. Of two students who had studied eighteen months in the School, one could have his degree immediately, because the rule in his State required no longer term of study for admission to the Bar: the other, if a graduate, must wait eighteen months, and study somewhere during that term, because his State required three years for admission; if he had not an academic degree, he must wait and study two years longer. The impropriety of making the degree depend on what transpired elsewhere, and especially upon inequalities arising under State rules and regulations, doubtless became apparent when it was further considered. (1)

Accordingly, on July 27, 1839, the Corporation made a further change, granting a degree to all who remained at the School eighteen months, but reducing this period to one year in favor of those students who were admitted to the Bar before entering the School.

Of this latter class, there were large numbers,—men who were attracted by Judge Story's fame.

*Voted* that the existing rule in regard to conferring the degree of Bachelor of Laws on the students in the Law School be modified so as to read as follows—all students who have pursued their studies in the Law School for three terms or eighteen months or who after having been admitted to the Bar have pursued their studies for a year, shall upon the certificate and recommendation of the Law Faculty be entitled to the degrees of Bachelor of Laws.

"This discrimination in favor of gentlemen who have been admitted to the Bar", said Judge Joel Parker in his pamphlet on the Law School, in 1871, "was doubtless intended to attract that class and induce them to avail themselves of the benefit of the School.

With a change which provided for the allowance of six months

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(1) See *The Law School of Harvard College*, by Joel Parker (1871).

study in another Law School having power to confer degrees, as a part of the eighteen months required, this rule stood for thirty years."

A slight change was made by vote of the Corporation, March 23, 1843:

*Voted* that all students who shall pursue their studies in the Law School for three terms or eighteen months, or who, having been admitted to the Bar after having studied law at least one year in the office of a counsellor at law, shall afterwards pursue their studies in the Law School for one year, shall be entitled, upon the certificate and recommendation of the Law Faculty, to the degree of Bachelor of Laws.

#### GROWTH OF THE SCHOOL.

The increase in the work of the Professors from 1829 to 1845 can be best understood from the following table showing the growth of the School.

The first column gives the number of students as stated in the College Catalogue; the second column gives the number of "law students resident at the University during the year", as stated in the President's Annual Reports; the third gives the number of students as reported by the Law Faculty in the President's Annual Report, the number varying at different times of the year; the fourth column gives the "whole number who have been in the School during the year" as reported by the Law Faculty.

1829-30	24	31		
1830-31	31	41		
1831-32	41	42		
1832-33	38	42		
1833-34	51	51	32-53	
1834-35	32	32	30-52	
1835-36	52	54	40-54	
1836-37	50	50	45-67	
1837-38	63	63	55-70	
1838-39	78	82	82-87	151
1839-40	87*	85	76-99	166
1840-41	96*	99	95-126	213
1841-42	99	115	120-126	213
1842-43	107*	118	126-132	180
1843-44	127*	117	115-128	180
1844-45	156*	153	150	223

In the starred years, the College Catalogue was issued in sev-



eral editions; and in such cases the figures of the last edition are used. (1)

Especial notice should be taken of the fact that the whole number of students in the School during each year was far greater than the number reported at any given date, as the fourth column of the table clearly shows. In considering the wide influence of the School, this fact must be constantly borne in mind. (2)

#### FINANCES.

Such an increase in the number of students placed the School financially in a most prosperous condition. The deficit owed to the College funds, which on Aug. 31, 1830, was \$2,152.44, and which owing to the building of Dane Law College was \$3,739.83 on Aug. 31, 1835, was reduced to \$859.65 in 1838; and the next year, 1839, the Law School Account showed a balance to its credit of \$801.34. In 1844, the balance had grown to the handsome amount of \$23,416.19—the largest balance to its credit until 1895. In 1845, after the expenses of enlarging Dane Hall (\$12,707.22) had been paid, the balance was \$15,453.98.

(1) See article on *Harvard College Annual Catalogues*, by John L. Sibley, in *Mass. Hist. Soc. Proc.*, Vol. VIII (1865), in which a full list of the Catalogues and totals of undergraduates and professional students recorded in each Catalogue and in each edition is given.

(2) It is to be noted that the above figures do not exactly tally with the figures as presented in the preceding Chapters, and as given below, from Professor Ashmun's and Professor Greenleaf's semi-annual Reports to the Overseers. The difference is to be accounted for by the varying dates on which the statistics made up. (See *Reports* in *Harv. Coll. Archives*.)

May, 1836, number of students 44, of whom 42 are present.  
 Oct. 17, 1836—50.  
 May 20, 1837—42 (number last term 32 that being about the average No. during the winter term).  
 Oct. 16, 1837—64 of whom 62 are present.  
 May 1, 1838, number of students 55 of whom 52 are present.  
 Oct. 10, 1838—78.  
 May 7, 1839—67.  
 May 2, 1840—72.  
 Oct. 20, 1840—99.  
 May 4, 1841—95.  
 Oct. 19, 1841—117 of whom 115 are present.  
 May 31, 1842—87.  
 Oct. 18, 1842—118.  
 May 2, 1843—105.  
 Oct. 17, 1843—128.  
 May 7, 1844—120.  
 Oct. 15, 1844—156.  
 Oct. 21, 1845—146.

The tables of receipts from term bills, and the yearly balances are as follows, as they appeared on the Treasurer's Account on Aug. 31, of each year.

	<i>Term Bills.</i>	<i>Balance.</i>	<i>Deficit.</i>
Aug. 31, 1834 (for year 1833-34)	\$4,604		\$2,776.82
1835	3,176		3,739.83
1836	4,548		3,312.29
1837	4,309		2,676.75
1838	5,591.52		859.65
1839	6,907.65	\$801.34	
1840	7,287.60	3,063.97	
1841	9,350	6,957.31	
1842	9,740	11,145.81	
1843	10,500	16,521.08	
1844	11,902.50	23,416.19	
1845	13,985	15,453.98	

During the years 1829-1845 the income from the Royall Professorship was \$397.18; the income from the Dane Professorship was \$500 from 1829 to 1836, and after 1836, \$750.

The Dane Professor was paid \$1000 per year. The Royall Professor was paid \$1500 per year, and from 1833 to 1837 a yearly sum of \$500 in addition, and from 1837 to 1845 a yearly additional sum of \$1000.

Payments to Instructors were also made as follows—to Professor Follen for his lectures on Civil Law in 1833-34, \$200; to Charles Sumner, in 1833-34, \$275 as Instructor, and for preparing the Law Library Catalogue \$160; in 1834-35, \$225 as Instructor, and \$30 for the Catalogue; in 1835-36, \$225 as Instructor; in 1836-37, \$150 as Instructor; in 1840-41 \$40 as Instructor; and in 1842-43, \$600 as Instructor.

The endowment of the School was still scanty, being confined to the Dane and Royall Professorship Funds amounting, Aug. 31, 1845, to \$22,943.63.

## CHAPTER XXX.

### THE TRANSITION PERIOD. 1845-1850.

At this stage in the Law School history, midway between its foundation and the beginning of the Langdell Régime, it may be of interest to pause and recall a few contemporaneous events.

In 1845, James K. Polk was President and Roger B. Taney, Chief Justice of the United States; George N. Briggs was Governor, Daniel Webster and John Davis were United States Senators, and Lemuel Shaw was Chief Justice, of Massachusetts; Green C. Bronson was Chief Justice, and Reuben C. Walworth, Chancellor, of New York; John Bannister Gibson was Chief Justice of Pennsylvania. Thomas Denman was Lord Chief Justice, and John Singleton Copley (Lord Lyndhurst) Lord Chancellor, of England.

Samuel W. Morse had just completed his successful experiments with the electro-magnetic telegraph; and ocean navigation by steam had been in existence seven years, since the arrival at New York from England, April 23, 1838, of the Great Western.

In 1840, penny postage and postage stamps had been introduced into England; in the same year, daguerrotypes were first taken, and Adams' Express was first established in Boston. In 1842, the railroad between Boston and Albany was completed—the first important through route in the country.

In 1845, postage rates in the United States were 5 and 10 cents according to distance, and two years later, postage stamps were introduced. Longfellow's *Psalm of Life* had been published in 1838; Emerson's *Essays* (first series) in 1841; Hawthorne's *Twice Told Tales* in 1842; Prescott's *Conquest of Mexico* in 1843; Lowell's *The Crisis* in 1844; Poe's *Raven* in 1845.

The Law School opened in the fall of 1845 with 126 students, increased during the autumn to 153, coming from 24 States. In the spring term of 1846 there were 132 students from 25 States ("11 North of the Potomac, 9 South, and 5 West of the Alleghenies").

Judge Story's death was a terrible blow to Greenleaf and to the students, a loss, which, as Greenleaf wrote to Sumner, Sept. 26,

1845, "affects me every day with deeper and deeper intensity of feeling. Nothing can exceed the loneliness of my situation in Dane Hall, notwithstanding the students cluster round me with affection and the studies all go on as far as I can supply his place on *his* lecture days—*sed quanto intervallo*." (1)

Greenleaf, however, attempted to carry through the regular routine of the School unchanged, writing (2) :

I am obliged to be in town tomorrow at 10.15 A. M. at the latest. I wish therefore that if possible you would be here in the 9 o'clock bus that I may announce you before I leave.

Let me now say, lest I should not see you, that both Judge Shaw and myself think it highly expedient to observe the old hours 9 and 10 A. M. for recitations, as so many other things have adjusted themselves to those hours. I think moreover that we shall do wisely, if we take care not to multiply the tokens of our loss of the Judge's presence. The fewer changes, the less like likely is an uneasy sensation to arise in the School.

The labor of giving two lectures daily except Saturday, holding one Moot Court on Monday afternoons and another on alternate Thursdays "in order to employ all the members of the Senior and Middle classes on the Moot Court at least once during each term," proved too heavy a burden for one Professor alone.

Accordingly, Charles Sumner was again called in to assist Greenleaf; and on February 28, 1846, John C. Adams, a student in the School 1841-44, a young man of brilliant promise, was appointed Instructor, his services during the remainder of the academic year and part of the next year, proving as Greenleaf reported, "highly useful and acceptable."

That Greenleaf's redoubled efforts were appreciated by his pupils is shown by the following notice appearing in the *Law Reporter* for February, 1846, (Vol. VIII.):

At a late meeting of the members of the Law School at Cambridge resolutions highly complimentary to Prof. Greenleaf for the manner in which he has performed the whole duties of instruction since the death of Judge Story, were unanimously adopted.

(1) Unpublished letter in *Sumner Papers* in Harvard College Library.

(2) See unpublished letter February 28, 1846, Greenleaf to Sumner—*Sumner Papers* in Harvard Coll. Library.

Jan. 26, 1846, Edward Everett was chosen President of the University, succeeding Quincy; and Benjamin R. Curtis took Story's place on the Corporation. President Everett was inaugurated April 30, 1846.(1)

The following graphic picture of the occasion is given by George F. Hoar, then a junior in College(2):

By a simple but impressive inaugural ceremony, Governor Briggs had just invested Mr. Everett with his office and delivered to him the keys and the charter.

Everett was stepping forward to deliver his inaugural address, when Webster, who had come out from Boston a little late, came in upon the stage by a side door. President and orator and occasion were all forgotten. The whole assembly rose to greet him. It seemed as if the cheering and clapping of hands and the waving of handkerchiefs would never leave off. The tears gushed down the cheeks of women and young men and old—everything was forgotten but the one magnificent personality. When the din had subdued somewhat, Mr. Everett with his never failing readiness and grace said "I would I might anticipate a little of the function of my office and saying, *Expectatio oratio in vernacula*—call upon my illustrious friend who has just entered upon the stage, to speak for me. But I suppose that the proprieties of the occasion require that I speak for myself."

Meanwhile, the Corporation had been busily engaged in trying to fill the Dane Professorship; for, as the *Law Reporter* said editorially, it was an easy matter to find a successor for Story as Supreme Court Judge, but difficult to replace him as Professor.

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(1) See *Records of the Board of Overseers* giving the following account of the Inauguration:

"The President Elect, with the Corporation and Overseers and invited guests, assembled in Gore Library, at X in the morning to await the procession at XI. At XI the procession moved from Gore Library to the First Church. The exercises commenced with a Voluntary on the organ. Rev. Dr. Walker of the Corporation then offered an appropriate prayer. Gov. Briggs next invested the President elect with the badge of office, the parchment charter of the College, the keys, etc., in an English speech.

The President made a short reply in English. A fine Latin oration was pronounced by George Martin Lane, Senior Sophister of the University.

A Hymn 555 of Greenwood was sung by the choir. The President delivered an English address of 1 hour and 20 minutes. Dr. Francis closed with a well adapted prayer. The Doxology was sung by the whole assembly.

Dinner was then served in Harvard Hall, for the first time since the foundation of the college without wine. The same abstemiousness was shown by the President at his well attended levee in the evening."

(2) *Autobiography of Seventy Years*, by George F. Hoar.

It would perhaps have been natural to turn to the man whom Story himself had frequently designated as his fittest successor—his young friend Charles Sumner. But Sumner had just delivered his famous Fourth of July oration on *The True Grandeur of Nations*; and the radical nature of his views on slavery and other social and political questions was beginning to alienate him from his old and influential friends and from the men who reigned supreme in College circles.

He had also largely given up law practice as his literary and political interests absorbed more and more of his time and attention. He undoubtedly, however, expected to receive an offer of the Professorship; for as early as seven years before, he had written to Greenleaf, Nov. 2, 1838: "You have thrown out some hints with regard to my occupying a place with you and the judge at Cambridge. You know well that my heart yearns fondly to that place and that in the calm study of my profession I have ever taken more delight than in the best debate at the bar"; and the failure of the Corporation at the present time to even consider his name was therefore a sore disappointment to him.(1)

Greenleaf, however, had informed the Corporation early in October, 1845, that his choice was William Kent, son of ex-Chancellor Kent, a Judge of the Supreme Court of New York, and, since 1838, Professor of the Law of Persons and Personal Property in the Law School of the University of the City of New York.(2)

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(1) Edward L. Pierce in his *Memoirs and Letters of Charles Sumner*, gives a contrary impression, but he is certainly wrong:

"There is some evidence that he was not indifferent to the canvass of names for the professorship, and was disturbed to find himself less regarded than formerly in the college, but none that he was inclined to detach himself from the new interests and activities into which he was passing. He wrote to his brother George, Sept. 30, 1845:

"I doubt if the place will be offered to me. I have so many idiosyncrasies of opinion that I shall be distrusted. I am too much of a reformer in law to be trusted in a post of such commanding influence as this has now become. But beyond all this, I have doubts whether I should accept it even if it were offered to me. I feel that I can only act as I could wish in a private station. In office my opinions will be restrained, and I shall be no longer a free man."

He cordially welcomed to the place, which remained vacant for nearly a year, Judge William Kent, 'a sterling character,' as Sumner described him, son of the Chancellor, and always maintained with him a most friendly intercourse and correspondence."

(2) In an article on Chancellor Kent's 80th Birthday in 1843, the *Law Reporter* (Vol. VI) said:

"He sees by his side a son the proper heir of his fame, as of his name, already occupied in the same high duties which have filled the father's



**William Kent**





Kent's character and abilities had been recognized not only by Greenleaf but by Story himself, who had indicated him as a fit choice for the United States Supreme Bench, in a letter to James Kent, April 25, 1844(1) :

O! that I had your excellent son as my colleague on the bench; then should I feel ready to depart in peace. I have even thought that he and Mr. Lord (Daniel Lord of New York, born in 1795) were the only candidates that as to age, character and qualifications, a President ought to select for the office. But what can we hope from such a head of an administration as we now have, but a total disregard of all elevated principles and objects. I dare not trust my pen to speak of him as I think. Do you know (for I was so informed at Washington) that Tyler said he never would appoint a judge "of the school of Kent?"

Poor Baldwin is gone, (April 21, 1844) another vacancy on the bench! How nobly it might be filled! But we are doomed to disappointment.

Kent, however, wrote to Greenleaf, October 30, 1845, declining the suggestion, on the score of ill health and disinclination to leave his aged father. Nevertheless, in the winter, the Corporation, after considering several other candidates, among them Henry Wheaton,(2) again turned to Kent, being largely influenced by Benjamin R. Curtis, his friend and contemporary(3) : and on February 25, 1846, Chief Justice Shaw and Charles G. Loring, tendered him the appointment in a letter concluding :

It is perhaps unnecessary for us to press upon your consideration, the various views, both of a personal and public nature, which the question of the acceptance of such an office, the labors and studies attending it, the associations which would be formed by a residence at Cambridge, and a connection with the Uni-

life, and we may say almost without exaggeration, 'melior patre', distinguished judge. We refer to the Hon. William Kent whose professional learning, various attainments, amiable character and elevated nature, are an ornament to the bar of our country."

(1) See *Mass. Hist. Soc. Proc.*, 2nd Series, Vol. XVI (1902).

(2) Wheaton's age, (60), was considered an objection; see letter of S. A. Eliot to E. Everett, Jan. 31, 1846. *Letters to President—Harvard Coll. Archives.*

(3) See *Life and Writings of B. R. Curtis*, by B. R. Curtis, Jr., Vol. I. Curtis wrote to George Ticknor June 6, 1846:

"I am sure you will be glad to learn that we have strong assurances both from Judge William Kent and his father that the former will accept the vacant Law Professorship. He has not actually accepted it, because he awaits his father's consent, to be sought after his return and conference with the Chancellor; but the latter has, in a letter to the Chief Justice (Shaw) substantially given his approval."

versity, the sphere of influence, of useful and extensive influence, which the office affords, are all considerations, which, with many others, will readily present themselves to your mind, and we have no doubt, will be weighed with due deliberation. We therefore forbear entering into details on the subject and will only add that we regard the office as one, in which great good can be done, not only to our own neighborhood and state, but to the wider circle of the whole Union.(1)

Greenleaf wrote to Kent, March 28, 1846:

Upon the receipt of your letter of Oct. 30, I quite gave up all hope of seeing you in a professor's chair here; especially as the Corporation had already begun to look in another direction. But finding the way again open, I gathered new hope, and ventured to submit your letter to Ch. Just. Shaw, of the Corporation; and I think it not improbable that, ere this arrives, you will have received at least a semi-official communication on the subject. Having urged this matter upon you, partly on grounds personal to myself, I ought now to mention that from recent indications I think it not impossible that the department *may* be so re-

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(1) See letter in possession of William Kent, Esq., of Tuxedo Park, N. Y.:

"The undersigned, Members of the Corporation of Harvard College, in behalf of ourselves and of all the other members of that body, ask leave to address you, informally respecting the Professorship of Law, in that Institution, left vacant, by the lamented death of Mr. Justice Story. In filling an office so intimately connected with the honor and prosperity of the legal profession, and with the best interests of the whole community, we have regarded it as a much more important object, to obtain a person highly qualified for the office, than to make a speedy appointment. One impediment to an earlier action on the subject has been, that when this vacancy occurred, a vacancy existed at the same time, in the Presidency of the College. This has been recently filled, and we hope and trust happily filled, by the appointment and acceptance of Hon. Edward Everett, who will in a few days, enter on the duties of that office. There was also another vacancy in our own Board, the full number of which, is seven only, occasioned by the decease of Judge Story, who was a member of the Corporation as well, as Professor of Law. This vacancy too has been lately filled.

At a recent meeting of the whole Board, after fine consideration, it was unanimously concluded to invite your acceptance of the vacant Professorship, with an observance, that on signifying your assent to the appointment, we shall be happy to confirm this informal invitation, by a formal election.

The undersigned were requested to communicate this invitation to you, and we have been desirous of doing it if possible, so that it shall reach you before you leave Europe, in order that you may have it under consideration, before fixing upon any plan for your future course on your return. Provision has been made, for an assistant teacher, to aid Professor Greenleaf in the duties of the Law School during the next academical term, of twenty weeks; thus, it is desirable, with a view to a more permanent establishment, to have an answer from you, as soon as your convenience will permit."

modeled as to determine me not to remain in it, but to seek employment in some other field; but yet not so changed as to render it less eligible for yourself, or any other gentleman. Should that be the case, I should feel guilty of deserting you, but for this intimation. But should I remain, nothing would gratify me more than to be associated with you.

To the letter from the Corporation, Kent, who had then resigned his judgeship and gone to Paris for his health, replied, May 13, 1846:

Nothing can be more flattering than the offer contained in your letter, nothing more deeply grateful to my feelings. It has almost irresistible attractions. The duties of a Law Professorship are congenial with my tastes. I have a warm friendship for the gentleman with whom I shall probably be associated and I admire and honor the Institution from whose government the offer proceeds.

He felt, however, that he could not accept the position until he had first consulted with his father, whose advanced age, (83,) demanded that his needs and desires should be supreme. Finally, however, he accepted the position.(1)

The Dane Professorship being regarded as the higher honor, the Corporation determined to confer it upon Greenleaf, to make the Senior Professor the Head of the Department, and to place the Dane and Royall Professors jointly in charge of the students, the Royall Professor alone having hitherto had this duty. Accordingly, a vote so amending the statutes of the Royall Professorship was passed on August 1, 1846. Greenleaf was formally chosen Dane Professor, and Kent, Royall Professor. Owing to the large increase in the number of students, the salary of each of the two Professors was increased to \$3,000.(2)

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(1) President Everett wrote Kent Aug. 3, 1846, "I anticipate from your connection with it a great increase of prosperity to our Law School and an addition not less welcome to us as individuals as to the good neighborhood of our domestic circle"—*Harv. Coll. Archives, Letters of the President*.

(2) See vote of Corporation, August 1, 1846:  
 "The Committee to whom it was referred to take into consideration the Rules, Regulations and Statutes of the Law School having attended to the subject and ask leave to report in part as hereafter stated and to sit again on the remainder of the subject.

The Committee respectfully recommend that the votes passed at a meeting of August 20, 1829, as a modification of the statutes of the Royall Professorship numbered 3, directing that the Dane Professor be considered for the present and until further order of the government, as

## WILLIAM KENT.

William Kent, the new Professor, was born in Albany, October 2, 1802. Graduating at Union College, he was placed by his father at Kinderhook, under the instruction of Peter Van Schaack. After two years, he entered the office of Judge Foot, at Albany. In 1823, when his father was retired as Chancellor and removed to New York, he entered the office of J. Ogden Hoffman. In 1828, he became a partner with his former instructor, Judge Foot, occupying offices with his father. That year, on the failure of the Franklin Bank, Chancellor Reuben H.

the head of the Law Department in the University, be rescinded; and in lieu thereof, it be declared and enacted, that the Senior Professor of Law, for the time being, be considered the Head of the Department in the University; also that part of the same article which provides that the Royall Professor shall have the immediate charge and oversight of the students, be rescinded; and in lieu thereof, it be declared and enacted, that the Dane Professor of Law and the Royall Professor of Law shall equally and jointly have the charge and oversight of the students; so that clause of said article when amended shall stand as follows—

The Senior Professor of Law for the time being is considered as the Head of the Department of the University. It shall be the duty of the Dane professor and the Royall professor to devise and propose from time to time to the Corporation such a course of instruction in the Law School as may best promote the design of that institution and the interest and honor of the University, and to do all in their power to promote those objects. They shall equally and jointly have the charge and oversight of the students, meeting them frequently at stated periods, to ascertain their progress, to assist in and stimulate their studies, and to explain and remove such doubts and embarrassments as may occur in the course of their reading.

*Voted* to accept this report and adopt the vote.

Whereas the number of students at the Law School has become so large as to require the constant attendance and services of both of the Professors and whereas the revenue from tuition fees has increased in the same proportion

*Voted* that there be allowed and paid out of the funds of the Law School arising from fees of tuition, to the Dane Professor a sum which added to the net annual proceeds of the fund specially applicable to the support of the Dane Professorship shall amount to the sum of \$3000 per annum, payable quarterly.

That there be allowed and paid to the Royall Professor of Law, a sum which added to the net annual proceeds of the fund specially applicable to the support of the Royall Professorship shall amount to the sum of \$3000 per annum, payable quarterly."

These votes were concurred in by the Overseers February 4, 1847.

Greenleaf accepted the Dane Professorship, Aug. 5, 1846, in the following letter:

"For this distinguished honor in the special circumstances under which it is conferred, I beg leave to express my most grateful thanks to the Corporation. I accept the office; and shall enter upon the discharge of its duties with alacrity and vigor, cheered by this renewed proof of their confidence, and feeling bound by an additional obligation to seek the prosperity of the Department confided to me and of the University whose honors I am permitted to wear."

Walworth appointed ex-Chancellor Kent receiver; and this at once gave the firm of Foot and Kent a large lucrative business. In 1830, he formed a firm with William S. Johnson. He was not a jury lawyer, declining cases of that description, owing to a distaste for the rough methods of jury trials. His gentle manner, his delicate, discerning nature, with a calm, suave temperament eminently fitted him for an adviser in chambers; and his learning gave his arguments of legal questions at Bar great weight.

The unspotted integrity which distinguished his character, and the naturally impartial and judicial qualities of his mind, made him much sought after as a referee and as trustee of large estates. The cases in which he was retained were usually those involving large sums and important issues<sup>(1)</sup>; and the lawyers with and against whom he strove were the leaders of the Bar of those days—David B. Ogden, John C. Spencer, Samuel Beardsley, Nicholas Hill, Benjamin F. Butler, Ogden Hoffman, David Graham, Daniel Lord, John Duer, George Wood, and Charles O'Connor.<sup>(2)</sup> In 1841, he became Judge of the New York Superior Court, and of his judicial services, his friend, Benjamin D. Silliman, said: "Never were the high duties of a judge performed with more purity or what are, perhaps, rarely combined, large general knowledge with great accuracy of knowledge."

Besides his legal attainments, Kent had few equals in the profession as a scholar in classics and general literature.

His reading on all subjects was extensive, in this respect greatly resembling his father, who had devoted a vast amount of time throughout his life to general reading.<sup>(3)</sup>

(1) Those who are interested may consult among some of his important cases—*Clark v. Fisher* 1 Paige; *State of Illinois v. Delafield* 8 Paige; *Warner v. Beers* 23 Wendell; *Bolander v. Stevens* 23 Wendell; *Curtis v. Leavitt* 17 Barbour, 1 Smith; *Beekman v. The People* 27 Barbour.

(2) Among the great jury lawyers in New York at this time were, Hugh Maxwell, William M. Price, Henry M. Western, James T. Brady, Ambrose L. Jordan, James W. Gerard, Ogden Hoffman, and David Graham.

For an interesting account of the New York Bar of this period, see *Life of Charles O'Connor*, by Charles P. Daly; *Magazine of American History*, Vol. XIII (1885). See also *The Bench and Bar of New York*, by L. B. Proctor (1870); and *Pleasantries about Courts and Lawyers of New York*, by Charles Edwards (1867).

(3) See *Memoirs and Letters of Chancellor Kent* by his great grandson, William Kent (1898).

"It is said that the old Chancellor, during his last illness, at the age of 84 years, when he could not sleep, on being asked if he suffered from

It was the personality of the man, however, quite as much as his legal talents, which attracted those who were seeking to fill the vacant Dane Professorship.

The fact that Judge Story had been, above all else, a lovable man, a friend to his pupils, an instructor who bound his students to him with the closest ties of personal affection, was constantly before the minds of the Harvard Corporation.

It would be an easy task to find, in any State of the Union, a talented lawyer; but it was far from easy to find a lawyer whose personal charms should continue to fill the Harvard Law School. Such a man, however, was William Kent. In all that was said of him by his fellow members of the Bar, during his life and at his death in 1861, no note is so prominent as that of personal love for the man—the memory of his kindly smile, his soft quiet speech, his winning manners, his affectionate nature.

"I have never known a man," said Silliman, "whose happy temper, warm heart, and kind and genial sympathies, so won and attached to him all classes, or so conduced to the happiness of all about him. I have never known a man whose wit and humor and knowledge were so abounding and so blended, and the instructiveness and beauty and grace and simplicity or whose conversation so attracted and fascinated."

Such was the new Royall Professor, on whose appointment the following editorial notice in the *Law Reporter* well expressed the opinion of the Bar (1):

The appointment of Judge Kent is a truly auspicious event to the College. He was one of those few men who have achieved the different task of adding honour to a name honourable by inheritance. He was for many years in large practice in the city of New York, where his learning, industry, fidelity and purity of life and character secured him the highest confidence and respect of a large circle of friends and clients. His appointment to the bench gave universal satisfaction; a satisfaction justi-

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depression in those long sleepless hours, replied that he did not—but that, on the contrary, he derived great satisfaction in reviewing in his mind some leading principle of the law, going back to its origin,—to the reasons from which it sprung—then recalling in their order the later cases modifying or enlarging it; at other time he would select some period of history, recall its politics, its eminent men, its military acts in all contemporaneous countries—sometimes a campaign of Alexander, Caesar, or Marlborough—its plan, its incidents and its results."

(1) *Law Reporter*, Vol. IX, p. 237 (1846); see also praise of the appointment in *Western Law Journal*, Vol. IV, (1846).

fied by the distinguished ability with which he discharged the duties of his high office.

He is a man not more respected for his attainments and abilities than beloved for his warmth of heart, his simplicity of character, and purity of life and conversation. He is now in the prime of life and in the full vigor of his powers and we reasonably hope from him a long period of valuable service. He presents in his own person that model of a good lawyer and a good man whose silent influence is more persuasive than the most eloquent oral teaching.

President Everett in his Annual Report spoke of the appointment as, "in a high degree satisfactory to the friends of the University and the public."

Kent at once removed with his family to Cambridge, where he was welcomed, not only by Greenleaf, but by all the Harvard College Professors<sup>(1)</sup>. From the outset, his popularity with his pupils was marked; and certainly no greater tribute could be paid to his personal charm, than his success in captivating the very students who had sat under Judge Story's spell.

On September 9, 1846, Greenleaf wrote to Chancellor Kent<sup>(2)</sup>:

I cannot resist the inclination to express to you the great delight we all take in our new Law Professor. He has made quite a strong and most decidedly favorable impression on all the gentlemen to whom he has been introduced, and I can hardly tell you how often I hear the remark, "I am delighted with your new Law Professor!" The students, too, those keen observers of character and manners, and often not easy to please, are quite taken with his manner towards them, and with the style and matter of his lectures. For myself, my every wish in regard to an associate is completely satisfied. I perceive his strength of mind and extent of learning are fully adequate, and more than sufficient, to sustain the Law School, even if he were left alone; and his kind solicitude to lighten my labors by taking his full share,—a relief I have never before enjoyed,—is most grateful to my heart. After the sorrows and cares of the past year, I

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(1) One of the first Harvard gatherings at which the new Professor was present was the Phi Beta Kappa exercises on August 27, 1846, at which Charles Sumner delivered an oration on "*The Scholar (John Pickering); the Jurist (Story); the Artist (Washington Allston); the Philanthropist (W. E. Channing)*" of which Longfellow said in his journal, "A grand, elevated, eloquent oration. Sumner spoke it with great ease and elegance and was from the beginning to the end triumphant."

(2) Unpublished letter in possession of William Kent, Esq., Tuxedo Park, N. Y.

now draw a long breath once more, and if I had done no other service to the University than to be the instrument of bringing him to this place, I should boldly claim the merit of having done it a lasting good. It is the place for him, and he is pre-eminently the man for the place. It is one in which the energies of his life will be most honorably and usefully expended in the advancement of our noble science, and in elevating the standard of morals in the young men who are to succeed us,—a work which will be felt in long coming time.

Thus much, my dear sir, I feel it due to you and to him to say. Much more crowds for utterance, but I suppress it. I am fully aware of the greatness of the sacrifice on your part, and indeed on his own; for I, too, have dear sons, and am descending the vale of life. But the sacrifice seems demanded by the high consideration of the great public good he is so well fitted to perform here,—*Non nostrum soli sumus*,—and I doubt not it will produce a rich reward—"blessing both him that gives and him that takes."

With many prayers for increasing comforts to yourself in your old age, and the love of Him who is the crown of a better hope than this life can afford, I remain

Dear Sir

Most respectfully and affectionately yours,

Simon Greenleaf.

This year of confusion in the Law School had been one of excitement throughout the Nation.

In May, 1846, Congress had declared war on Mexico. As is well known, the war met with more bitter opposition in Massachusetts than in any State of the Union. At the Law School, the students were sharply divided on the question, and many exciting debates took place in the Debating Club. The large numbers of students from the South, and the prevalence of oratorical ability among them, produced many conflicts with the strong body of conservative Whig students. Chief among the Southern students as a debater appears to have been Patrick Henry Aylett (L. S. 1845-47), a young Virginian, great grandson of Patrick Henry. It is said that when he was present at a mass meeting favorable to the war held in Faneuil Hall in Boston, "someone announced during the speaking that a descendant of Patrick Henry was present. Immediately there was a great outcry for him and he was forced upon the rostrum. His speech is said to have made Faneuil Hall shake with applause as it was wont to do when Webster, Everett, Choate, and Winthrop spoke." (1)

(1) *Virginia Lawyers, Green Bag*, Vol. X.



The slavery question was now becoming more and more acute. In August, David Wilmot of Pennsylvania proposed, in Congress, his famous Proviso, that slavery should be forever prohibited in all territory acquired from Mexico. Henry Wilson moved in the Massachusetts Legislature, resolutions "which should express in fitting terms the hostility of Massachusetts to the institution of slavery." At the Whig convention in Faneuil Hall in September, 1846, Charles Francis Adams and Charles Sumner proclaimed the divorce between the "Conscience Whigs," and the "Cotton Whigs", Sumner thus emphasizing the estrangement between himself and his former friends. During this year, Lowell began the publication of his *Bigelow Papers*.

In 1846-47, the very small reduction in the number of students showed that Professor Kent's appointment had met with favor, 133 being reported as present October 20, 1846. In the spring term, the number fell, as usual, there being then reported 102, of whom only 32 were from Massachusetts.

Professor Kent gave courses during this year on Insurance, Sales, Agency, Partnership, Kent, and Blackstone; Greenleaf, on Equity Jurisprudence and Pleadings, Common Law Pleadings, Evidence and Real Property.

Kent was the first Law Professor installed without inaugural ceremonies; for, as President Everett wrote to him February 1, 1847, the practice had "fallen into disuse on account of expensiveness, the interruption caused to the regular business of the Institution which extends to several days besides that on which the ceremony takes place, the inconvenience of public dinners at the University," so that for twelve years no College Professor had had formal inauguration.(1)

In November, 1846, Chancellor Kent, then 83 years old, paid a visit to his son, described by Edward Simon, who was then a student in the School, (1844-47), in a recent letter as follows(2):

Chancellor Kent was then very ancient and seldom visited. He gathered enough strength to come to hear his son lecture. His advent had been announced and we were all on tip-toe for the occasion. My memory depicts him as a tall person bowed

(1) See Letters of President Everett to Kent, February, 1847, and to Greenleaf, February 22, 1847—*Harvard Coll. Archives, Letters of the President*.

(2) Letters to the author from Edward Simon of St. Martinville, La., November, 1907.

down by his great age, moving slowly under its pressure as he walked towards the seat appointed for him in the lecture room. His son had ascended the rostrum, when the Chancellor appeared, slowly with weak steps advancing towards the front bench. A burst of applause from the several students greeted him, such as is seldom heard. He bowed courteously to us. His son the professor was so affected by this demonstration that he wept like a child and could hardly proceed with his lecture. To our disappointment the Chancellor made no address.

At the close of his first year, Professor Kent found it necessary to resign owing to the increasing infirmity of his father. The announcement of his intention was received with great regret (1), and by no one more than by his students, who addressed a letter to him, the tone of which may be gathered from Kent's reply, dated from New York, October 12, 1847:

I have read with deeply gratified feelings your communication in behalf of my former pupils of the Law School. I did not willingly leave you and them, nor resign without sincere and lasting regret my tranquil and pleasing life in the University. It was an event which left me no choice—it was a point of duty admitting of no question that compelled me to relinquish the pursuits, studies, duties, and society which made the last year the happiest of my life. Your well known names bring vividly before me the generous and ingenuous youth, whose unvarying courtesy, patient attention, and increasing application made my instructions a source of daily pleasure, and my intercourse with them a subject of the most pleasing recollection.

I do not assume to myself the praise which your warm feelings award. It is sufficient to me to be conscious of having earnestly

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(1) See *Law Reporter*, Vol. X, (Oct. 1847):

"It is believed that the duties of his post were congenial to his tastes and it is admitted by all that he performed them with eminent success. His amenity and simplicity of manners, his learning and his willingness to teach interested the School at once in him and in their studies. His relations with the other gentlemen engaged in the different departments of the University were of the happiest character. It is a source of no slight regret that he should be obliged to withdraw from such a field of usefulness leaving a place vacant which it will be difficult to fill with equal satisfaction to the University and to the community. But the health of the venerable Chancellor Kent seemed to leave him no alternative."

President Everett wrote to Kent Sept. 10, 1847,—*Harv. Coll. Archives—Letters of the President*:

"The difficulty we had in filling the vacancy occasioned by Judge Story's decease was so great, our satisfaction in common with that of the public was so entire and our apprehension of the shock which the Law School will suffer by your leaving it, are so lively, that I must hope you will so far re-consider the subject as to suspend your definite resignation or await for a while longer the progress of events."

endeavored to teach the just interpretation and nature of our laws and to inculcate the true spirit of professional practice. Happy shall I be if permitted to believe that amidst the scenes of life which are immediately opening to you and your contemporaries, anything that I may have taught shall be resorted to in the moments of trial, difficulty or temptation, which occur to all, and shall be found to give "ardour to virtue and confidence to truth."

The following resolution was passed by the Corporation on Sept. 18, 1847, in accepting the resignation(1) :

That the President be requested to tender to Judge Kent the assurance of the high respect entertained by the Corporation for his personal character and professional standing, and their deep regret for the loss of his services in the Law School and of their sincere sympathy with him in those domestic afflictions which have made his resignation necessary.

Greenleaf was thus again left alone at his post at the beginning of 1847-48(2) ; and during the first term gave courses on Blackstone, Equity Pleadings and Jurisprudence, Bills and Notes, and Bailments, assisted on ten lecture days by John C. Adams and on fifteen by George T. Curtis (L. S. 1833-34).

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(1) Kent wrote, six years later, Feb. 17, 1853, to President Walker: "I often look back at the happy year I spent within your walls. It was a singular episode in my life and so strangely contrasted with my present pursuits that it seems like a dream."—*Harv. Coll. Papers*, 2d Series, Vol. XIX.

(2) Prior to this time, Greenleaf had been relieved of continuing his residence in Cambridge, owing to reasons connected with the health of his family.

See Vote and Report of Committee Chief Justice Shaw and C. G. Loring—*Corporation Records*, June 26, 1846:

"Upon full inquiry and after a free conference with Mr. Greenleaf, we are satisfied that upon personal consideration of great weight, he has come to the conclusion that he cannot continue to reside at Cambridge permanently with his family consistently with his duty; and we are satisfied that under the peculiar circumstances of the case he is right in his conclusion. He has no desire of obtaining an exemption of the duty of personal residence at Cambridge with a view of engaging in any other business nor of withdrawing any portion of the time and attention usually given to his daily attendance on the School. Highly, therefore, as we estimate the importance of the rule which requires a residence of the Professor at Cambridge, we are of opinion that under the special circumstances of the case, it is expedient to grant Mr. Greenleaf an exemption from his duty on and after the termination of the present term and during the pleasure of the Board.

*Voted* that Professor Greenleaf of the Law School from and after the termination of the present term be exempted from the duty of a permanent residence at Cambridge during the pleasure of the Board; it being understood that this measure will in no other respect affect his duties as such Professor."

The following reference to Greenleaf, written by a student of that period, gives an interesting illustration of his general attitude towards the student body:

We well remember portions of Prof. Greenleaf's introductory lecture in 1847 to the Senior Law Class of which we were a member. We were greatly pleased with it then, but, even before the close of the term, became satisfied that the learned and good Professor was in error. He said that the members of the class had come there to learn the law, and, it was presumed, understood the importance of correct conduct—that was a matter submitted wholly to themselves, that he and his brother of the faculty were not there to act as high constables over a parcel of legal gentlemen.(1)

The Corporation again found great difficulty in selecting a new Professor. One of the lawyers prominently suggested had been John Mason Williams, Judge of the Court of Common Pleas from 1821 to 1839 and Chief Justice from 1839 to 1844; but he was regarded as too old to undertake a new occupation, being then 67 years of age. Peleg Sprague, Judge of the United States District Court, had been considered, but had declined. Benjamin R. Curtis and Charles G. Loring, members of the Corporation, had both declined. Judge Frederick H. Allen of Maine had been strongly urged. Sumner had been again considered, but was vigorously opposed by those who dissented from his radical views on political and social questions, and who comprised the wealthy, educated, and conservative portion of Boston, holding the controlling power in College affairs. Furthermore, it would appear that neither his personality nor his services had been particularly acceptable to the students, on the occasions when he had served as Instructor.(2)

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(1) *Legal Education—Law Schools in Western Jurist*, Vol. VIII, (1874).

(2) See interesting letter from Chief Justice Shaw to President Everett—*Harv. Coll. Papers*, 2nd Series, Vol. XV.

Edward L. Pierce in his *Memoirs and Letters of Charles Sumner*, Vol. II, says:

"William Kent, while unable to comprehend Sumner's departure from conservative teachings and associations, showed a tender and un-failing interest in his welfare. His letters are instructive, as revealing how Sumner was regarded by one who was repelled by what seemed to Kent his delusions on politics and moral reforms, and yet who had come near enough to him to feel his worth and the charm of his personal qualities. He wrote, Sept. 24, 1847, soon after signing the law professorship at Cambridge:

'You ought to succeed me, Sumner. The place was yours by heredi-





**Henry Wheaton**

Meanwhile, Greenleaf favored the appointment of two new Professors instead of one, being convinced, as he wrote to Everett, that the "sad experience of the last two years shows the inadvisability of the School depending on the life or health of one Professor." (1) He wrote further that instruction in International and Constitutional Law, Roman and Civil Law, Conflict of Laws, Equity Jurisprudence and Pleading, and Admiralty was extremely necessary; and he referred to the increased attention which legal education had attracted in the last few years,—the placing of the Yale Law School on a permanent foundation, and the opening of new schools in New York, New Jersey, New Orleans and elsewhere:

Nothing has contributed more to this than the establishment of the Cambridge School, which has now its imitators and will soon have its rivals, in all parts of the Union. In the discussions of the subject in England, and especially before the Parliamentary Committee, this Institution has been repeatedly appealed to by the friends of Academical Instruction as an example worthy of imitation there; and I believe it has had its effect in the recent revival of readings and Lectures in the Inns of Court.

The Corporation, though not prepared to establish a new professorship, appointed as Lecturer on Civil Law and the Law of Nations, October 3, 1847, Henry Wheaton, then late United States Minister to Prussia, and author of *Elements of International Law*.

He died, however, before beginning his lectures. (2)

tary right, and it required incessant efforts on your part to divest yourself of this right. You have chosen a lot more brilliant perhaps, more exciting certainly. You have troops of friends and enthusiastic applause; and you think you are doing good, and you are certainly generous in your aspirations and aims. I regret, however, deeply regret, your course. You ought to have been a great lawyer, adding to the fields of jurisprudence, extending the domains of judicial truth, teaching us what are the maxims of justice between man and man, and nation and nation, and how conflicting claims shall be adjusted. I wish you had been liable to censure, similar to that of Goldsmith on Burke, and that you had given to the profession what you now conceive is meant for mankind. I think you are in error, and I am your friend so sincerely that I risk your displeasure by plainly telling you so. Strike, but hear!"

(1) See *Harv. Coll. Papers*, 2nd Series, Vol. XV.

(2) Henry Wheaton was born in Providence, Rhode Island, November 27, 1785, graduated from Brown in 1802, and studied in a law office in Providence, where he practised until his removal to New York in 1813. He published his famous *Treatise on the Law of Maritime Captures and Prizes*, in 1815—the first American work on the subject. In 1816, he was appointed Reporter of the United States Supreme Court, a position which he held until 1827, appearing also before that Court in

This appointment of a Lecturer did not meet with Greenleaf's approval, and he wrote to Everett, Oct. 2, (1) :

I observe that Mr. Wheaton is to deliver a course of lectures on legal subjects, by which I understand lectures written out to be read to the students. This method was tried in Dr. Follen's day; and though his lectures were both learned and elegantly composed and well delivered, they were not interesting to the students and were at last nearly deserted. That mode of instruction has heretofore not been acceptable to the law students.

The policy of the Corporation was, however, thus expressed by President Everett in his Annual Report for 1846-47 :

The condition of the Law School does not at this time admit of the establishment of a permanent Professorship of Civil and

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many important cases, associated with Webster and other leaders of the Bar. On the death of Judge Livingston, in 1823, his name was considered, together with that of ex-Chancellor Kent, for the vacancy, to which Smith Thompson, of New York, was finally appointed.

In 1824, he was elected a commissioner by the New York Legislature with John Duer and B. F. Butler, in the first attempt made by any State to draw up a civil and criminal code.

In 1827, he became Chargé d'affaires in Denmark, where his great knowledge of International Law brought him distinction. He was appointed, in 1835, Minister to Prussia, which position he held until 1846. While there, he published a pamphlet advocating the Suez and Panama Canals, being the pioneer of these projects. His ability and experience were recognized to such an extent that foreign diplomats frequently sought his advice.

In 1847, he returned to America, being displaced by President Polk, and died March 11, 1848. He published, in 1836, his world-famous *Elements of International Law*, and in 1845, his *History of the Law of Nations*. These works have had numerous editions, and it has been said justly that "if they did not create International Law, they at least made it a science." He was, in fact, the founder of the modern law of that subject.

See *Henry Wheaton, Green Bag*, Vol. XVI (1844); and an especially interesting monograph by William V. Kellen entitled, *Henry Wheaton, an Appreciation* (1902). See also *Obituary of Wheaton*, by Charles Sumner, in *Boston Daily Advertiser*, quoted in *Western Law Journal*, Vol. V (April 1848).

(1) From letters of President Everett to Chief Justice Shaw, March 13, 1846, and to Wheaton, Sept. 29, 1847, it would appear that the Corporation had in mind to make Wheaton later a full professor—See *Harv. Coll. Archives, Letters of the President*.

Everett wrote to Greenleaf Nov. 16, 1847 :

"Among the reasons which led the Corporation to establish this lectureship, was the opinion repeatedly expressed by yourself and Judge Kent that such a lectureship would materially add to the attraction of the Law School, accompanied occasionally by a favorable estimate on your part of Mr. Wheaton's qualifications for it for which he is the best fitted in the United States as far as familiarity with the subject creates fitness."



International Law; but the President is not without hopes that the success of the present experiment will be such, as to warrant the Corporation in recommending the foundation of such a Professorship, at no distant period.

The number of law students is about the same as at the commencement of the last academic year,—a satisfactory indication that the public confidence in the School remains unimpaired, by recent changes. The appointments made the present term . . . are such as to warrant the hope, that this confidence—hitherto so liberally enjoyed by the institution—will be confirmed and strengthened. At the same time, it may be proper to state, that law schools are springing up in considerable numbers, and in some instances under the most respectable auspices, in different parts of the Union. The names of fifteen or sixteen institutions already organized or projected have been given to the public; and it would be no matter of surprise should they divert to establishments nearer home a portion of those who might otherwise come to Cambridge. It will be the steady aim of the Corporation, by engaging the highest professional talent in the chairs of instruction, by constantly adding to the library, already, it is believed, the largest law library in the United States, and by every other mode of increasing the advantages of the School, to sustain the honorable name which it has hitherto enjoyed, and, if possible, to render it more and more worthy of public confidence.

To fill the Royall Professorship the choice of the Corporation finally fell on Joel Parker, the distinguished Chief Justice of New Hampshire. He at first declined the appointment; but being strongly pressed by Everett (1), he came to Cambridge, inspected the School with Greenleaf, and finally decided to accept the appointment formally made by the Corporation, November 6, 1847.

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(1) See letter of Everett Oct. 6, 1847, *Harv. Coll. Archives, Letters of the President*:

"I would observe that the duties of the office are perhaps less onerous than you suppose. They amount, I believe, to only one lecture per diem for five days in the week for 40 weeks. . . . This lecture is not usually nor frequently a written lecture, but an oral commentary on the text book, requiring, I suppose, not more preparation than an ordinary charge to the jury in cases when no nice point of law is to be discussed. Besides this, you would preside half the time in the Moot Courts, held weekly, and, having a very commodious office, rent free, in Dane Hall, would give your attendance there, generally in the forenoon, to receive calls from students and aid in directing the miscellaneous affairs of the School. . . .

Both Professor and Mrs. Kent have assured me that he was particularly pleased with the office and happy in it and found it more to his taste than any he ever filled. . . . I will only add that if you could be prevailed to come among us, I think you would find an amicable and hospitable social circle, and such a welcome as you could wish."

## JOEL PARKER.

Joel Parker was born in Jaffrey, New Hampshire, January 25, 1795.(1)

His father had been an early settler in the town, having removed there from Pepperell, Mass., a farmer, a leading man in the County, and for some time Judge of Probate. Parker graduated from Dartmouth College in 1811, six years before the famous *Dartmouth College Case*, in the same class with Chief Justice Shepley of Maine. After reading law in his brother Edmund's office in Amherst, N. H., he was admitted to the Bar in 1815, the year in which Isaac Parker became Royall Professor, and began to practice in Keene, N. H. In 1821, he removed to the West, opening an office in Cincinnati, and was admitted to practice in the United States Circuit Court in Columbus, in January, 1822. The venture was unsuccessful; few clients appeared; and he soon returned to New Hampshire, where he served in the Legislature, in 1824-26.

His practice, especially in cases involving abstruse legal problems, increased; and in 1833, he was appointed to the Superior Court, becoming in 1838, its Chief Justice. In 1837, Dartmouth College conferred on him the degree of LL.D., and from 1845 to 1857 he held the Professorship of Medical Jurisprudence in that College. In 1842, four years after he became Chief Justice and five years before his appointment as Royall Professor at the Law School, Parker seriously considered resigning his judgeship, because of its meagre salary of \$1,300, and engaging in business.(2)

Fortunately he did not carry out his plan, and each year his judicial fame increased, both in and out of New Hampshire; so

(1) See *Biographical Sketch of Joel Parker*, by George S. Hale, *Amer. Law Review*, Vol. X (1875).

*Memoir*, by Emory Washburn, *Mass. Hist. Soc. Proc.* (1875).

(2) *The Law Reporter* said (Vol. V, November 1842), in a review of one of his charges to the Grand Jury:

"Since reading this excellent charge we have heard a rumor that Mr. C. J. Parker has resigned the place which he so ably fills upon the bench of N. H. and has accepted the agency of one of the Lowell factories. If this be true we are sorry for it. We are sorry that he has left a place which he has occupied with such ability and such usefulness and condescended to assume a function so inferior in dignity and usefulness, however more lucrative it may be. We confess that we desire to see among the members of the Bar and of the Bench, some sense of the dignity of their place and profession, and to have them governed by the feeling that to secure the largest possible income is not the chief end of man."

that in 1844, the *Law Reporter* said: "It would not be unjust to his associates to distinguish Mr. C. J. Parker as entitled to peculiar honour for his services on the bench. He may be justly regarded as one of the ablest judges of the country." (1)

As a judge, he was cautious, critical, and exact to the utmost, achieving the highest reputation for care and thoroughness of research, and for independence of opinion. His judgments, while very numerous (2), were notable, not only for sound learning and profound analysis, but also for their fairness and impartiality. If he had a defect at the Bar and on the Bench, it was that he too frequently shot over the heads of those whom he was seeking to convince—the jury as well as the court. Of his fearless adherence to his own convictions, when opposed to the opinions of others, however eminent in place and influence, the most noted instance, prior to his acceptance of the Royall Professorship at Harvard, had been his judicial conflict with Judge Story over the interpretation of the bankrupt law of 1841—an episode so characteristic of the man as to deserve detailed notice.

In April, 1842, Judge Story, in an elaborate opinion in *Ex-parte Foster* (2 Story 131), had held that the clause of the Federal bankruptcy act preserving "all liens, mortgages or other securities on property real or personal which may be valid by the laws of the States respectively," did not apply to attachments on mesne process; that property so attached in the State courts should be handed over to the Federal assignee in bankruptcy, and that the Federal courts had the power to restrain the State courts by injunction from giving effect to such attachments. A year and a half later, in January, 1844, in *Kittredge v. Warren* (14 N. H. 509), Judge Parker delivered an opinion strenuously denying the doctrine laid down by Story (3). In July, 1844, Story, in *Bellows v. Peck*, (3 Story 428) reaffirmed his former opinion, saying that it would be the duty of the District Court to enjoin the creditor or the sheriff from proceeding to judgment or levy on property attached in the State court; and that the laws and courts of the

(1) See *Law Reporter*, Vol. VII, May, 1844.

(2) During his term of service on the bench, there were no official court reporters, the judges themselves preparing the volumes of New Hampshire Reports. Judge Parker wrote the opinion in 510 out of 1244 cases.

(3) In *Hubbard v. Hamilton Bank*, 7 Metc. 314 (1844), Dewey J. speaks of "the very able and learned opinion of Chief Justice Parker in *Kittredge v. Warren*."

See also *Davenport v. Tilton*, 10 Metc. 326 (1845).

United States were paramount to the authority of those of the State. Later in this same year, Parker responded in a tart opinion, in *Kittredge v. Emerson*, (15 N. H. 227), in which this vigorous and recalcitrant utterance was made:

There is further matter in the opinion in the case of *Bellows v. Peck*, of a character which may well astonish, if it does not alarm us, and which we cannot pass by in silence upon the present occasion. . . . There is no principle or pretence of a principle of which we are aware, on which we can admit the right of the Circuit or District courts in any manner to interfere and stop the execution of the final process of the courts of this State. It is an assumption of power that cannot be tolerated for a single instant. . . . If our opinions respecting his (the U. S. District Judge's) authority are correct, a resort to coercive measures to enforce an injunction or to punish a disregard of it, might possibly not be entirely safe, for those at least, who should attempt to execute the order; but this is a matter upon which we shall not enter. Should our faith on this subject prove unfounded, our course is clear.

This whole question had become one of States' rights against Federal interference, and New Hampshire now urged precisely the same grounds in behalf of State sovereignty that South Carolina and other Southern States had so long been maintaining; and in June, 1844, the Governor of New Hampshire called the attention of the Legislature to the controversy and to the perils that must flow from it. On December 26, 1844, the Legislature unanimously passed a joint resolution sustaining "the firm and decided stand" of the court "in opposition to the unwarrantable and dangerous assumptions of the Circuit Court of the United States." On December 31, 1844, Judge Story responded to Parker and the New Hampshire State Government, by an elaborate opinion, or rather dictum, in *Ex-parte Christy* (3 Howard 292), as the case called for no opinion on the points pressed by Story, (the Court holding that it had no jurisdiction). Judge Parker, therefore, in a case arising a few months later, July, 1845, in New Hampshire,—*Peck v. Jenness* (16 N. H. 516),—absolutely disregarding the dicta of the United States Supreme Court, reaffirmed his original decision. This case was decided on appeal to the United States Supreme Court in 1849 (7 Howard 612)—four years after Story's death, and two years after Parker became Royall Professor—and the decision was wholly in Parker's



*Very truly yours*

*Joel Parker*



favor and against Story's views. So ended the famous Seven Years' War.

Of Parker's personal characteristics, the most prominent were the independence of his judgment and the positiveness of his convictions reached slowly but decisively. His nature was in a marked degree tender and sensitive, but his outward manner was calm and cold and gave slight indication of his finest traits. When aroused, he was controversial in the extreme, especially during the latter part of his life; and for keen sarcasm and stinging retorts, some of his political pamphlets during the war, and especially his sketch of the Law School written in 1870, may be regarded as masterpieces in that style of composition. Emory Washburn, later for many years his colleague in the Law School, thus described him:

In his intercourse with others, he was genial, free, and affable, and could unbend to playfulness and familiarity without compromising either dignity or self respect. The cheerfulness and urbanity with which he always greeted his friends and associates, added much to the pleasure of his society as a man of liberal culture and broad experience, and marked him out as a man whom it was a privilege to know, and one not easy to forget.

Besides his thorough absorption in his profession, Judge Parker was devoted to flowers and poetry, and also extremely fond of society.

Such was the man who was about to take Judge Story's place.

As Judge Parker was not ready to take up his Law School duties at once, George Ticknor Curtis was again appointed, November 27, 1847, Instructor for the rest of the term; and February 26, 1848, Greenleaf was voted \$500 as extra compensation for his added labors.

At the March term of 1848, Judge Parker assumed his new duties (although he did not resign as Chief Justice until June 25, 1848). Of the difficulty of these duties, he himself has given a most graphic description(1):

When I entered upon my duties I found that the topics which formed the subject matter of the lectures for a two years' course, had been divided between Professors Greenleaf and Kent, the year before; that Professor Kent's course devolved on me; and

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(1) *The Law School of Harvard College*, by Joel Parker (1871).

to my dismay, Shipping and Admiralty was upon my list for that term.

My residence in the interior of a State which had had but one port, the business of which was nearly all transacted in Boston, had given me no occasion to become acquainted with that branch of the law, and I tried in vain to escape by an exchange. Professor Greenleaf's answer that he was then in the middle of his topics for the course, showed that he could not comply with my request. So, frankly stating the difficulty, I told the students I would study the text-book with them.

But there was another difficulty, of a more general character. It was understood to be my duty to deliver a certain number of lectures, and to hold a certain number of Moot Courts, beside taking a share of the general superintendence and management of the School. I had listened to one lecture and the half of another, by Professor Greenleaf, in which with great ease, he expounded the principles of the branch of the law then under consideration, occasionally interspersing questions to the students. How far he followed, directly, the text-book before him, was not apparent.

The practical difficulty which met me, in the outset, arose in this way. I was to deliver a *lecture* upon a certain topic, and was at liberty to interpose as many questions as I pleased; but there was a text-book, twenty, or thirty, or more, pages of which, furnished the foundation of the lecture. The students were supposed to have read this portion of the text, in anticipation of the lecture, and to be reasonably acquainted with the contents. Confining myself within these limits, how was I to proceed? It was not expedient for me to state the propositions in the words of the text. The students were acquainted with them already. It would be of little advantage to vary the phraseology, and state the same principles in different formulas. If the text-book was a good one, how was I to deliver a lecture without a "departure," which lawyers well know is, in pleading, obnoxious to a special demurrer. I might escape the dilemma by asking questions, but that was, to that extent, turning my lecture into a recitation by the students. I availed myself largely of my privilege, however, and having made an earnest request to the students to ask me any questions on their part, they availed themselves of their privilege. The School was at that time a very strong one, many of the students being on their last term. And so we had for sometime a lively interchange of interrogatories. It was not difficult to perceive that the students were disposed to try the new Professor, and I enjoyed it, for, having been fifteen years upon the Bench, I felt much more at home in answering questions, than I did in delivering law lectures, properly so-called.

In this way I gradually found my way out of my embarrassments, having come to the conclusion that text-books were not the perfection of law lectures, and that it would be no departure from a true lecture to subject the book to a rigid criticism, travers-



ing its propositions if they were unsound,—qualifying them if the principle were stated too broadly,—suggesting exceptions, where they existed,—amplifying those parts where brevity had limited the statement too closely (not, perhaps, a very common fault),—and referring largely, in some instances, to contradictory decisions.

An illustration occurs to me, as I write, perhaps as marked as any which could be selected. Coming to the part of the text-book on Bailments, which treated of the question whether a common carrier can limit his liability, by a notice to the owner of the goods that he will be answerable only for negligence, or by an agreement with the owner that he should be so answerable only,—the suggestion was naturally made that they could not rely upon the text, nor upon the decisions referred to in the notes, because the extraordinary responsibility of the carrier,—that of an insurer, with certain exceptions,—did not arise from contract, and therefore was not governed by the law which regulated contracts in general, but was, as they had been called to note, imposed upon him by the policy of the law, for the reasons stated,—that the carrier could not relieve himself from this responsibility by a notice that he would not be bound by the rules of the law, even if such notice were given directly to the owner,—but this policy of the law did not prevent the carrier from making an agreement with the owner, for a more limited responsibility, which would be binding on the owner—nor from making reasonable rules for the government of his business in relation to the times of receiving goods, for notice of contents of packages, respecting payment, etc., and that notice of such rules would impose upon the owner the duty of complying with them,—adding however, that the decisions were contradictory, and the practitioner must carefully ascertain what were the doctrines held by the Courts in the State where he resided, and govern himself accordingly.

Recapitulating the principles stated in the text, to some extent, where they appeared to be sound, in order to cover the ground by a connected discourse, and resorting to the method which I have stated where the matter appeared to call for it, I preferred, where I could shape them to advantage, to put cases illustrative of the subject matter for the answers of the students, instead of questions directly upon the text-books. Suppose a client should state his case thus—, what would be your opinion, or what would you advise him? In this way the student made a practical application of what he had read and heard.

Where there was no suitable text-book, which was thought to be a fact in some instances, I had, of course, to state and maintain my own propositions.

But there came, in time, a new difficulty respecting questions of any sort,—and that was in obtaining answers to them without consuming too much of the time assigned to the lecture,—arising mainly from a fear, on the part of the student, that the answer

might be wrong,—and an erroneous answer, made in the face of the whole School, was a subject of dread. There would doubtless have been less of this on questions directly upon the text-book, although in that case the facility of obtaining answers will naturally vary considerably at different terms. . . .

In June, Professor Greenleaf's health failed, and he left the School, and the city, to seek rest and repose elsewhere, tendering his resignation, to take effect at the close of the term. He had probably a premonition of that disease of the heart which suddenly terminated his life, in 1853.

The School was thus left wholly on my hands for the remainder of the term, with an experience of something more than three months to direct me.

Upon a new division of topics in the course of the vacation, with Professor Parsons, who succeeded Professor Greenleaf, I was desirous of retaining Shipping on my list, in the hope that my studies on that subject, during the last term, might avail me somewhat in another course of lectures; but the answer that his practice had been in Boston, and that branch of the law a specialty, could not but be admitted as a conclusive reason why I should give it up; as I did also the other text-book which had served as the basis for my other course of lectures; so that I entered on my second term with the necessity of entire new preparation so far as lectures were concerned.

The care of the School proved, at last, too great for Greenleaf, so that on May 15, 1848, he tendered his resignation, stating that his health demanded a long rest; and it was accepted by the Corporation, June 10, in a vote expressing their great regret.(1)

In an affectionate letter of June 16, the law students, in token of their regard, requested their beloved Professor to sit to Healy for his portrait, to be placed in the Lecture Room.(2)

(1) See *Harv. Coll. Papers*, 2nd Series, Vol. XV, Letter of Greenleaf of May 15, 1848; Vol. XVI, Letters of Greenleaf of May 15, 1848 and May 31, 1848.

(2) "Sir—The members of Harvard Law School have received, with regret, the announcement that impaired health has compelled you to resign the professorial chair which for many years you have filled with distinguished honor to yourself and usefulness to your pupils.

By the severance of a connection which has been the source of eminent advantage and gratification to us, we are reminded, that of more than a thousand young men who, within the past fifteen years, have been attracted by the celebrity which genius has conferred upon this institution, we are the last who will receive your instruction. With a grateful appreciation of your personal kindness, we are sensible of the faithfulness, ability, and eloquence which have marked your public labors. Nor shall we remember with less satisfaction, that the clearest and most comprehensive views of jurisprudence have been blended with those more important moral principles entering into the character of the upright lawyer, so happily illustrated and adorned by your own life.

Leaving the institution, you carry with you the enthusiastic regard of

George F. Hoar, a student in the School, 1847-49, mentions in his autobiography: "There was some discussion whether it (Greenleaf's likeness) should be a bust or a picture, and if a bust, of what should be the material. Daniel S. Curtis said 'Better make it Verd Antique. That means, Old Green.' "(1)

A petition to have the portrait hung in Dane Hall Lecture Room was granted by the Corporation on July 3, 1848.(2); and the Corporation voted on the same day "in consideration of his long and faithful services as Royall and Dane Professor", to ap-

your pupils. May your retirement be followed by renewed health and leisure, as well for your own happiness as for the completion of those juridical labors which are expected with the liveliest interest.

The members of the Law School desire that the hall which has been so attractive from your presence, should be adorned with your portrait; and respectfully request that at your convenience you will grant the necessary opportunity.

In behalf of our associates,

Mellen Chamberlain,  
C. Demond,  
Edw. Griffin Parker,

William F Miller,  
Thomas Russell, Jr.,  
Campbell White,

Committee.

Greenleaf replied, June 17, 1848:

Gentlemen:—I have received your communication of yesterday with the liveliest emotion. Among the painful circumstances attending my departure from these seats of learning, with which I have been long and happily connected, none has created so keen a pang as the separation from my beloved fellow-students and pupils. No service could have been more grateful to me, than that of directing the remainder of your professional studies; but the admonitions of physical infirmity forbid it, and demand a season of repose from cares already too exhausting.

For the favorable estimate you are pleased to take of my endeavors, and the sentiments of affectionate regard which you express, as well as for the uniformly kind and respectful deportment of every member of the Law School towards me, be pleased to accept my warmest thanks.

In my future studies and labors for the advancement of our favorite science, I shall be cheered by the contemplation of this period of my life, in which I have been so delightfully associated with kindred spirits, destined to act an important part in the preservation of social peace and happiness, and in the conservation of our institutions.

May you reap the rich reward of successful efforts in this glorious cause.

In regard to the request, with which your communication closes, as it points to a perpetual memorial of the sentiments thus mutually entertained, I have neither the heart nor the power to decline a compliance with your wishes.

Most affectionately and faithfully yours,

Simon Greenleaf.

(1) *Autobiography of Seventy Years*, by George F. Hoar, Vol. I.

(2) See *Harv. Coll. Papers*, 2d Series, Vol. XVI, Letters of Mellen Chamberlain, June 26, 1848, July 3, 1848.

Greenleaf himself with others had presented to the Law School, in 1847, the full length portrait of John Marshall which now hangs in Austin Hall.

point Greenleaf "Emeritus Professor of Law".<sup>(1)</sup> For the second time within a year, and the third within two years, the Corporation was called upon to appoint a new Professor. And of all members of the Bar, the one to whom the minds of the Corporation naturally turned, was Rufus Choate as the most eminent, the most brilliant, and the most widely known.<sup>(2)</sup>

(1) On his retirement the *Western Law Journal*, Vol. V, (Sept. 1848) said:

"We regret to learn that Professor Greenleaf has been compelled by ill health to resign. . . . We have learned to look to him as one of the bright and pure lights of American Jurisprudence."

The next year, Greenleaf was appointed one of the Justices of the Massachusetts Supreme Court, but declined. He continued actively at work in his profession until his sudden death Oct. 6, 1853. His literary labors during the latter years of his life were very considerable. In 1846 he published the second, and in 1852, the third, volume of his *Evidence*. His invaluable edition of *Cruise's Digest of the Law of Real Property with Notes*, appeared in 1850, dedicated "To my beloved Pupils, these labors originally undertaken for their benefit are inscribed by their affectionate friend."

Among his other legal works were *Remarks on the Exclusion of Atheists as Witnesses*, (1839); and *An Examination of the Testimony of the Four Evangelists by the Rules of Evidence Administered in Courts of Justice, with an account of the Trial of Jesus*, (1847).

He was for many years President of the Massachusetts Bible Society. He was greatly interested in the establishment of African Colonization and he prepared the original constitution adopted by the infant colony of Liberia.

At a meeting of the Suffolk Bar, held on his death, the following were among the resolutions presented by Charles G. Loring:

"Resolved that by his laborious, genial and successful services as teacher of the law in the school at Cambridge, he has deserved the gratitude of his country; for there he has, through many years assisted in the training up of the youth of America, drawn thither from every State by his fame and that of his associates, in the principles of jurisprudence, in elevated views of professional conduct, to exemplify and diffuse them in all parts of our land.

Resolved, that while we remember, with a melancholy pleasure, the peculiar grace and dignity of voice, person and manner that marked our deceased brother, we reflect with unmixed satisfaction upon the knowledge that these were but the signs of a purity and grace within, of a religious discipline of many years and of no common vigor, which made his sudden death one from which he needed no prayer for deliverance."

(2) See *Life of Rufus Choate*, by S. G. Brown (1878).

Edward G. Parker in his *Reminiscences of Rufus Choate* (1860), said:

"In 1850 Professor Greenleaf told the writer that in a civil or a criminal case, taking law and fact into view as they were to be presented in the presence of a jury, he considered Choate, to use his exact words, 'more terrible than Webster.' At the Bar meeting when he died, one of his old and toughest antagonists, whom I have often seen pitted against him, declared that though he had known J. Mason, S. Dexter, D. Webster and many other warrior lawyers, yet he thought as a court combatant Mr. Choate was more formidable than any man he had ever known." . . .

John T. Morse, in the *Memorial History of Boston*, Vol. IV, says:

"Choate was the magician of the Bar. His power over a jury was as masterful as his method of obtaining and exercising it was peculiar.



*1311/12 Chouk*



While such an appointment would require Choate to renounce his immense jury practice, it was felt that his duties at the School might be so adjusted as to allow him to retain his practice before the Supreme Court in Washington, which sat from early in December to the middle of March (the Law School vacation extending from the middle of January to the first of March).

Choate gave the matter careful consideration; but as it was considered imperative that he should reside in Cambridge as Dane Professor, "on account of the influence which his genial manners, his habitual presence, and the force of his character, would be likely to exert over the young men", he finally declined the offer.

Although Choate refused the Law School Professorship, his influence was nevertheless all-powerful among the students. Whenever he was to argue a noted case in Boston, the Law School often attended the trial in a body; and frequent mention is made by students of the School in the years 1840-1850 of their interest in his arguments and cross-examinations.(1)

Two famous trials in Massachusetts at this time were of especial interest to students—the first that of Albert J. Tirrell for murder, in which Choate had made his remarkable and successful defence, based on the theory of the commission of the murder during an attack of somnambulism. The other was noted the Oliver Smith will case, in 1847, in which Choate and Webster were the opposing counsel. The case turned upon the point whether one of the subscribing witnesses was insane to such an extent as to render him incompetent to witness the will.

In consequence of Greenleaf's poor health the entire burden of the School during the spring had been on Judge Parker, and as he now had serious thoughts of resigning,(2) he was anxious to have the Corporation appoint, as either his colleague or his suc-

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. . . His sway over his educated fellow citizens was as complete as over rustic jurors. His tactics in trying a case were Napoleonic. He left no precaution uncared for to secure success, and then fought with an intensity, an energy, an élan which seemed to render such precautions superfluous—not till the sheriff had the execution in hand did Mr. Choate ever regard a case as hopelessly lost."

(1) A. Oakey Hall in *Cross Examination as an Art*, *Green Bag*, Vol. V (1894), said:

"I often and in company with such classmates as Rutherford B. Hayes (L. S. 1843-45) and George Hoadly (L. S. 1844-45) of Ohio—listened to and studied, in connection with Greenleaf's fitting chapter in his *Evidence*, the cross examination of Rufus Choate."

(2) See interesting letter of Pres. Everett to Chief Justice Shaw, June 14, 1848. *Harv. Coll. Arch., Letters of the President*.

cessor, some New Hampshire lawyer. Ex-Professor Kent strongly urged John Duer of New York. George P. Marsh of Vermont was also suggested. The Corporation gradually sifted the candidates to two—Theophilus Parsons of Boston, and Samuel Ames, a distinguished lawyer of Providence, Rhode Island, (later Chief Justice of that State) who was strongly urged by Albert C. Greene, United States Senator from that State, Judge Levi Woodbury, Story's successor on the Supreme Bench, and by many Rhode Island lawyers.(1)

The choice finally fell on Parsons, chiefly on the recommendation of Greenleaf, and of Charles G. Loring and Chief Justice Shaw as the "Law Lords" of the Corporation(2); and he was duly elected Dane Professor, July 15, 1848.

#### THEOPHILUS PARSONS.

Theophilus Parsons was born March 17, 1797, at Newburyport, son of Theophilus Parsons (later Chief Justice), being at the time of his appointment as Professor, fifty years old, two years younger than Parker. In 1800, his father moved to Boston, and he entered Harvard College in 1811, when fourteen years old, graduating in the class of 1815, with Jared Sparks, John A. Lowell, Thaddeus William Harris and Dr. John Jeffries. He studied law in the office of William Prescott, and in 1817, owing to ill health, he went to Europe, where he was the guest of William Pinkney, then Minister to Russia. Returning to Boston he opened a law office, but soon moved to Taunton, Mass., in 1822. Besides representing the town in the Legislature, he devoted much time to literary pursuits, being a prominent contributor to the *North American Review*. This magazine was then the only substantial

(1) See letter of Levi Woodbury to Shaw, July 18, 1848, *Harv. Coll. Papers*, 2nd Series, Vol. XVI.

(2) See letter of C. G. Loring to Shaw, July 13, 1848, *Harv. Coll. Papers*, 2nd Series, Vol. XVI.

"Knowing, however, the influences of personal friendship such as Mr. Greene professes, not only in the expression of opinions but in the holding of them, and particularly when called upon for recommendation of his friend—I cannot feel that confidence in the commendation which I have in the familiar and certain knowledge we have of one who has passed his life in the midst of us, and about whose qualifications we, and especially as most of us are not intimate friends, cannot be very essentially in error. And it seems to me the safe course to take a candidate of whose fitness especially we feel assured from personal knowledge, than to resort to one more highly commended, but of whom our chief information is from professed personal friends at a distance from us."



and well known quarterly in the country, and being under the editorship of Professor Edward W. Channing, was regarded as the organ of the Harvard literati. In 1825, Parsons established and edited a monthly magazine—the *United States Literary Gazette*. He was also joint editor of the *Taunton Free Press* with Pliny Merrick (who was later a judge of the Massachusetts Supreme Court). After his removal to Boston, in 1827, he became associate editor, with Judge Willard Phillips, of the *Galaxy*. In Boston, he at once acquired a very lucrative practice, becoming one of the leading admiralty and insurance lawyers in the city, so that shortly before his appointment as Professor, it is said that he was counsel for all the insurance companies.

Like William Kent, Parsons owed his appointment quite as much to his engaging personality as to his legal ability. Like Story, he was famous for his conversational powers. He had a vivid, decided, easy, and colloquial manner of talking, and his fund of anecdote and reminiscence was a constant source of attraction to his friends and to his students. The swiftness of his mind, the vivacity and the intimacy of his bearing made it a source of delight to the student to consult with him. His voice was clear and sonorous; his delivery smooth and unhesitating; and his lectures were never dull, for he gilded the points and rules with stories and illustrations.

Parsons accepted his appointment, July 18, 1848; and, as President Everett stated in his Annual Report, "gave a signal proof of his zeal and interest in the welfare of the School by entering with the following term, and consequently with a few week's notice, upon the full routine of laborious duty." (1)

The policy of aiding the Professors by additional Lecturers was followed out by the appointment on July 29, 1848, of Franklin Dexter, a noted lawyer of Boston then United States District Attorney, as Lecturer "to deliver one day a week, lectures on

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(1) In an informal letter to the President on July 18, Parsons further showed his enthusiasm for his new task by urging that immediate notice of the filling of the Professorship should be given in order that no loss of students should be occasioned to the School:

"I fear that much mischief will result from the delay in filling the vacancy. Professor Greenleaf, Mr. Stearns and others think, from what they have seen and heard, that numbers of the scholars are preparing to go elsewhere who might be recalled. It seems to me important that our advertisements should be inserted as soon, and circulated as widely, as may be."

Constitutional Law and such other subjects as he may select," at a salary of \$1,500.(1)

On September 30, 1848, Luther S. Cushing was appointed as Lecturer on Civil and Parliamentary Law.(2)

With these appointments began the Third Era of the Law School history.(3)

As was natural during this period of change and uncertainty as to Professors, the number of students in 1848-49 fell off largely, being only 87 in the first term and 91 in the second term.

Among the students about this time who achieved distinction in after life were Francis Parkman (L. S. 1844-46); Anson Burlingame (L. S. 1844-46); Leverett Saltonstall (L. S. 1847-48); Mellen Chamberlain (L. S. 1846-49), later Chief Justice of the Municipal Court of the City of Boston; Waldo Colburn (L. S. 1848-49), later Judge of the Supreme Court of Massachusetts; Horace Gray (L. S. 1848-49), later Chief Justice of the Supreme

(1) Franklin Dexter was the son of Samuel Dexter. He was born in 1793, graduated from Harvard in 1812, and appointed United States District Attorney in 1841.

(2) Luther Stearns Cushing was nephew of Professor Asahel Stearns. He was born in 1803. He had been associated with Charles Sumner and George S. Hillard in editing the *American Jurist* during its early years. In 1832 he was chosen Clerk of the Massachusetts House of Representatives holding the office three years. In 1844, he was appointed Judge of the Court of Common Pleas and in 1848, Reporter of the Massachusetts Supreme Court. In 1844, he wrote his famous *Manual of Parliamentary Practice*; in 1837, a *Treatise on Trustee Process*, and a *Treatise on Remedial Law*; in 1838, he translated *Savigny's Law of Possession*; in 1839, *Pothier's Contracts of Sale*, and in 1850, *Domat's Civil Law*.

(3) Coincident with this new era in the law School was the beginning of a new régime in the University itself, under the elaborate revision of the "Statutes and Laws of the University at Cambridge with the Orders and Regulations of the Faculty," adopted in 1848. There had been no revision of these Statutes and Laws since that of 1825 (with its amendments in 1826 and 1828).

Under vote of the Corporation of Sept. 12, 1846, President Everett prepared a complete revision which made many changes and additions in the constitution and administration of the College and the other departments of the University; and this was adopted by the Corporation, June 10, 1848, (concurred in by the Overseers, Sept. 17, 1848). For the first time in the official records, the Law School was recognized as a formal separate department of the University, as follows:

"Section 11. The University consists of the Academical Department, and of the Divinity, Law, Medical and Scientific Schools. Each is under the direction of its appropriate Faculty, of which the President is ex-officio the head.

Section 12. The Senior Professor of the Professional and Scientific Schools shall act as the head of the Faculty of the same, and shall preside at its meetings and on its public occasions, unless the President shall be present and preside. A dean may also be appointed by the Faculty of each professional school if deemed expedient by the Corporation."

Court of Massachusetts, and Justice of the United States Supreme Court; George F. Hoar (L. S. 1847-49) later United States Senator from Massachusetts(1); William A. Richardson (L. S. 1845-46) later Chief Justice of the Court of Claims; William C. Endicott, (L. S. 1849-50) later Secretary of War; Augustus L. Soule (L. S. 1848) and Charles Allen (L. S. 1848-49) later Judges of the Massachusetts Supreme Court. During Professor Parson's first year, there was some complaint among the students that his legal knowledge was too closely confined to the subjects of his law practice, Admiralty and Patents;(2) but this soon died out; and the Professors themselves denied the discouraging statements that had prevailed, regarding the condition of the School, by announcing in the Report in October, 1849:

The condition of the Law College is perfectly satisfactory. The industry of the students in the Library, their thorough investigation of the Moot Court questions, their attendance upon the lectures, and their intelligent reception of all the instruction we can give are such as to demand our highest commendation.

Francis Bowen writing in the *North American Review* in 1849,

(1) Of his Law School life, Hoar wrote in his *Autobiography of Seventy Years*:

"I cannot state too strongly my great debt to it and to Franklin Dexter, Simon Greenleaf, Joel Parker, Theophilus Parsons—The Dane Law School was then—a most admirable place for learning the science of law and preparing for its practice. The youth breathed a legal atmosphere from morning till night all the year round. He had the advantage of most admirable instructors and the resources of a complete library. He listened to the lectures, he studied the text-books, he was drilled in the recitations, he had practice in the moot-courts and in the law club. He discussed points of law in the boarding house and on his walks with his companions and to understand their mental processes and the methods by which they had gained their success. The title of old Nathan Dane to a high place on the roll of his country's benefactors and to the gratitude of the profession of the law and of all lovers of jurisprudence throughout the country, cannot be disputed."

(2) See *Harv. Coll. Archives, Letters of the President*.

See letter from S. A. Eliot to President Sparks, April 29, 1849, *Harv. Coll. Papers*, Vol. XVI., referring to an anonymous letter directed against Parsons, with threats of burning him in effigy.

"It will be time enough to take so serious a step as discharging a professor when it is manifest that the decline of the school is owing to him. As it is not to be supposed that any one man can be master of all branches of law and the very organization of the school implies the necessity of having different professors qualified in different departments, I am not in the least troubled by criticisms upon the defective knowledge of any individual in one branch. . . . Of course we must not be hasty but observant; and decide after sufficient experience whether there is any permanent cause of decline in the school of whether it experiences only those fluctuations of popularity and reputation to which all human institutions are liable."

thus spoke of the condition of the Law School and of the College(1):

The Law School alone flourishes like a green bay tree; though we wish both for its own sake and that of the College, that it also could be removed to Boston where more of its students could live at home, and all could attend the courts.

It is evident we think that the College proper . . . is in danger of suffering the fall of the Roman maiden Tarpeia and being crushed by the weight of the ornaments of brass simulating gold which are heaped upon it. Notwithstanding the shower of benefactions that has seemed recently to fall into its lap it is actually poorer, weaker and less efficient than it was many years ago.

And President Everett, when he resigned his office, Jan. 18, 1849, wrote to the Law Professors and Lecturers in reply to their letter of regret, a long letter expressing his belief in the prosperous state of the School, in which, after stating that, when he accepted the Presidency, he had hoped to prepare a course of lectures in International Law for the Law School, he continued: "Much as the School owes to your distinguished predecessors it is not the language of compliment but of justice and truth to say that it never stood on a firmer basis and never furnished equal facilities for an accomplished education in every branch of the legal profession." (2)

The course of instruction for 1848-49 was as follows: Lectures by Parker—First Term, Equity Pleading and Agency; Second Term, Common Law Pleading, Wills and Administration, Equity Jurisprudence; lectures by Parsons—First Term, Real Property and Contracts; Second Term, Blackstone, Kent, Real Property and Contracts; lectures by F. Dexter—International Law and Patents; lectures by L. S. Cushing—Parliamentary, Civil and Criminal law.

In addition, as stated in the President's Report:

The students were also instructed in the preparation of pleadings and other legal instruments and in the practice of their profession; and the vicinity of the School to the City of Boston has given favorable opportunities for personal observation of the practice of the different courts.

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(1) Review of S. A. Eliot's "*Sketch of Harvard College*," by Francis Bowen—*North Amer. Rev.* Vol. XV.

(2) *Letters of the President*—*Harv. Coll. Archives*.





*Franklin D. Roosevelt*

The new Professors laid especially stress upon Moot Courts, holding two each week, and saying in their Reports(1) :

The Professors entertain no doubt of the utility of this part of the instruction of the School. It trains the student for the actual practice of his profession better than any other exercise and the diligence and ability exhibited in the examination of the authorities, the preparation of the briefs and in the arguments at the bar would have done credit to practitioners of considerable experience.

Professor Parsons' interest in his new work was at once shown by his zealous championing of Greenleaf's views on many subjects, especially of the plan for the appointment of a third Professor. Finally the Corporation yielded; and on August 15, 1849, adopted a report of Chief Justice Shaw and B. R. Curtis in favor of such appointment, by passing the following votes :

*Voted* that some suitable person learned in the law be appointed to assist with the two permanent Professors in the lectures and other courses of instruction to students, to be denominated University Professor in the Law School.

That this arrangement be considered as made for one year only.

That such Professor shall not be required to reside at Cambridge, or to perform any of the duties incident to such residence nor to relinquish the practice of his profession, and that he be allowed and paid a salary of \$2,000 payable quarterly.

Frederick H. Allen was chosen as the new Professor(2) and accepted the position, September 10, 1849. The appointment was made necessary by the declination of both Luther S. Cushing and Franklin Dexter to continue longer as Lecturers.

Frederick Hunt Allen was a prominent lawyer of Bangor, Maine, who had been strongly recommended for the position by many Maine lawyers at the time when Joel Parker was chosen to the Royall Professorship in 1847. He was born in New Salem, Mass., February 3, 1806, son of Rev. Samuel C. Allen. He was a graduate of the University of Vermont; and he had been a Member of Congress from Maine and a Judge of one of the State District Courts. While little known outside of his State,

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(1) See Reports of April 27, 1849 and October, 1849.

See also President Sparks' 24th Annual Report, 1848-49.

(2) The vote was concurred in by the Overseers, Feb. 7, 1850.

he was considered by the Harvard Corporation to be well adapted to fill the new Professorship; for in person, he was a man of amiable, bland, and affable manners; practical, conservative, and scientific as a lawyer; a fine scholar, and one of the most popular of the State Judges. (1)

Still another of Greenleaf's suggestions, urged by Parsons, was adopted by the Corporation on September 29, 1849, in voting that:

Prizes not exceeding \$200 in the whole amount for any one year shall be annually awarded for Dissertations written by students of the Law School on subjects given out by the Law Faculty according to such a plan as the Faculty may adopt and as shall be approved by the Corporation.

That the merit of the Dissertations shall be adjudged by Committees of Counsellors at law appointed by the Law Faculty.

That the prizes shall be awarded at the close of each academic year by the Law Faculty. No prize to be awarded if no Dissertation offered shall be deemed to have sufficient merit.

In accordance with this vote, the Catalogue of 1849-50 contained the announcement that prizes would be awarded of \$60 for the best, and \$50 for the second best dissertation written by a student who had attended the Law School three of four terms immediately preceding the award; also prizes of \$50 for the best, and \$40 for the second best dissertation by a student who had attended two of the three terms next preceding the award. The subjects announced were, *On the Competency of Witnesses and Stoppage in Transitu*; and the first judges were Hon. William Kent, Chief Justice John J. Gilchrist (L. S. 1830-31) of New Hampshire, and Peleg W. Chandler (L. S. 1835-36). The first prizes were awarded to D. B. Eaton (L. S. 1849-50) and J. C. King (L. S. 1848-50) on the first subject, and Buel Bushnell (L. S. 1849-50) and George Gorham (L. S. 1849-51) on the second subject. (2)

In the year 1849-50, a Visiting Committee, composed of Judge Peleg Sprague, Professor William Kent, Judge Albert H. Nelson, Peleg W. Chandler, and Charles Sumner, reported that there was

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(1) See letters in *Harv. Coll. Papers*, 2nd Series, Vol. XVI.

(2) No copies of prize dissertations are now to be found in the Harvard Law School Library, although Professor Parsons wrote to President Walker, Oct. 26, 1856, (*Harv. Coll. Papers*, 2nd Series, Vol. XXIII) "Judge Shaw suggested some two or three years since that we should have Prize Essays. The thing has worked well, and we have many essays which ought to be kept safely, and we propose to keep them."



"occasion for lively satisfaction" in the condition of the Law School. It also gave the following description of the system of instruction employed—a system which remained practically unchanged for the next twenty years, the subjects of the lectures only being varied.

Lectures had been given, during the current term, by Professor Parker, upon Equity Pleadings, Bailments, and Practice; by Professor Parsons, upon Blackstone's Commentaries, the Admiralty Jurisdiction, Shipping, Bills and Notes; and by Professor Allen, upon Real Law and Domestic Relations. In treating most of these branches, the Professors adopted certain text-books, of acknowledged authority,—to which the attention of the students was especially directed,—as the basis of their remarks. They also examined the students in these books, and in the leading cases illustrating the subject.

This system of instruction, which has been continued in the School since its earliest foundation with substantial uniformity, has shown itself to be well adapted to the end in view. It is essential that the student should be directed to certain text-books. These he must study carefully, devotedly; nor can he properly omit to go behind these, and verify them by the decided cases. No day should pass without its fulfilled task in these labors. In this way he will be prepared for the examinations, and will be enabled to appreciate the explanations and illustrations of the lecture-room, throwing light upon the text, and showing its application to practical cases. The labors of the student will qualify him to comprehend the labors of the instructor. Still further, examinations in the text-books, accompanied by explanations and illustrations, help to interest the student in the subject, and to bring his mind directly in contact with the mind of his instructor.

There is another advantage of a peculiar character afforded by the Law School, in the opportunity of kindly and instructive social relations among the students, and also between the students and their instructors. Young men engaged in similar pursuits, are professors to each other. The daily conversation concerns their common studies, and contributes some new impulse. Mind meets mind, and each derives strength from the contact. But the instructor is also at hand. In the lecture-room, and also in private, he is ready to afford counsel and help. The students are not alone in their labors. They find an assistant at every step of their journey.(1)

(1) The Report of the Visiting Committee, Nov. 20, 1854, stated: "All the students are now admitted to all the lectures and to familiar interviews with the Professors and Lecturers at their offices for advice on obscure points, direction to the best sources of information and guidance to the wisest methods of investigation. This unrestrained intercourse is encouraged to an extent without precedent, but from the great variety of subjects presented to the Instructors for many consecutive hours their physical and mental energies are severely taxed."

In this Report, the casual reference to an examination of students in "leading cases" is interesting as containing the germ of the Case System idea, introduced twenty years later. Under Story and Greenleaf, specific cases had been more or less discussed; but the presentation of cases in the lecture room on which the opinion of the student should be obtained, was now introduced as a regular part of the course, described by President Sparks in his Annual Report for 1849-50 (and in succeeding Annual Reports) as follows:

The number of Lectures during the year has been ten each week, accompanied with the usual examinations upon the matter of the text-books, and the presentation of cases connected therewith for opinions by the students. The application of the subject-matter of the lecture in this mode is believed to be even more beneficial and satisfactory than direct examinations, which test the memory of the student, rather than aid him in applying what he has learned to actual practice.

At the close of this year (1849-50) it was decided by President Sparks and Chief Justice Shaw of the Corporation, not to reappoint Judge Allen as University Professor, owing to the insufficiency of the Law School funds and the partial failure of Professor Allen to interest the students. Parsons was very anxious that Judge Cushing should now be appointed University Professor, with the understanding that he should do half work and receive half pay, (his work as Reporter of the Massachusetts Supreme Court taking most of his time). The Corporation, however, decided simply to re-appoint Cushing as a Lecturer.



**Luther S. Cushing**



## CHAPTER XXXI.

### THE ERA OF RAILROAD AND CORPORATION LAW.

The years 1820-1830 were the era of canals and of the rise of railroads.(1)

The great Middlesex Canal Corporation, chartered in 1793, had been in successful operation in Massachusetts for many years. In 1825 came the completion of the Erie Canal in New York and the beginning of the Delaware and Hudson Canal in New Jersey. In the same year, 1825, however, Governor Levi Lincoln of Massachusetts in his message approving a canal from Boston to the Connecticut River suggested that he had "been assured that another mode, by railways, had been approved of in England" and, he added, "how far they would be affected by our severe frosts cannot be conjectured yet." He also stated that whether they were better than canals remained to be determined.

The first railroad operated in this country, the Granite Railway Corporation, was chartered in Massachusetts in 1826 and constructed to transport, by horse power, granite for the new Bunker Hill Monument.

In the same year, New York chartered the Mohawk and Hudson Railroad Co.

The next year, 1827, Massachusetts became a pioneer in the railway agitation by appointing a Board of Commissioners of Internal Improvements to survey a route for a railway from Boston to the Rhode Island boundary, and also to the New York boundary. It made a report to the Legislature, urging that the roads when built should be operated by horse power;(2) and this was the power for which all the early railroads were designed.

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(1) *The Journal of Law* (Phil. 1831), Vol. I, contains an article on the *Law Relating to Masters of Ships and Common Carriers* which makes no mention of railroads, but notes the "increasing importance of Carriers by Canal Boats."

(2) A contemporary view of this project is given by J. T. Buckingham in his *Personal Memoirs*: "It was in the summer of 1827 that the railroad mania began to manifest itself. The idea of a railroad from Boston to Albany or even to Springfield was met with ridicule in the Legislature as a project too absurd to be discussed with gravity."

An editorial in the *Boston Courier* in June says 'a project which every

But in October, 1826, George Stephenson had demonstrated in England the success of his steam locomotive, the "Rocket" (1); and the introduction of steam power in the United States soon followed.

July 4, 1828, the Baltimore and Ohio Railroad was begun, fourteen miles being opened for traffic by horse power in 1830, and sixty-one miles by steam in 1831. English locomotives drew trains on the Delaware and Hudson Canal R. R. in 1829, and in December, 1830, the first American steam locomotive was used on the South Carolina R. R. (2) Between 1825 and 1830, thirty-six miles of railroad had been built in South Carolina, New Jersey and Maryland. In Massachusetts, though a number of railroads were incorporated, construction was not begun for several years, owing to the discouraging effect produced upon investors of capital by the decision in the famous case of *Charles River Bridge v. Warren Bridge* (7 Pick. 344), in 1828. This case, holding that the grant of a toll bridge charter by the Legislature did not preclude a later Legislature from chartering a free bridge, located so close to the former bridge as to deprive it of all profits, and that a legislative charter did not grant exclusive rights by implication, proved an obstacle in the path of railroad promoters for almost nine years i. e. until the question was finally settled on appeal by the Supreme Court of the United States in 1837. (3)

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one knows, who knows the simplest rules in arithmetic, to be impracticable but at an expense little less than the market value of the whole territory of Massachusetts, and which if practicable every person of common sense knows would be as useless as a railroad from Boston to the Moon."

(1) A full description of this trial trip appeared in the *Boston Daily Advertiser*, November 23, 1826, and on Nov. 25, that newspaper stated that "These experiments constitute a new era in the history of railroads. They prove conclusively that they are adapted in the most perfect manner for rapid travelling, whatever power may be used."

(2) An article in *Internal Improvements in American Quarterly Review*, Vol. VIII, in December 1830, said:

"So far then as animal power is concerned, railroads are not more than half as advantageous for transportation as canals. The search at the present moment is therefore for such friction saving apparatus as will place railroads on a level with canals. . . . Upon the success of some such friction saving apparatus must depend the great question whether railroads can compete with canals. . . . Railroads however, are about to derive new advantages from the application of steam to locomotion."

(3) A brief resumé of the progress of railroad building during these years is of interest in its bearing both on the legal and on the commercial and political history of the country, for as John F. Dillon has said: "Marshall's judgments, and our lines of railways and telegraph have done more than any other visible agencies in making and keeping us one united nation."

Twelve miles, from Albany to Schenectady, on the Mohawk and Hud-

The advent of canals and railroads sounded the death knell of the turnpike companies. In fact, the increasing wealth of the towns and the consequent building of town highways had already affected the prosperity of turnpikes; and in 1827, Massachusetts had passed an act allowing turnpikes to be laid out as public highways, by the town authorities.(1) In turn, however, the ruin of the canal companies was brought about by the growth of the railroads, and most of them either failed or were bought up by the railroads or dragged out a feeble existence with no profits.(2)

To Chief Justice Shaw of Massachusetts chiefly belongs the glory of laying down the broad principles on which the Law of Railroads was framed by judicial decision, although the courts of

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son R. R. were opened in 1831. The Camden and Amboy R. R. (chartered in New Jersey in 1830) was completed in 1834 as a through route from New York to Philadelphia. In Massachusetts, the State in which the greatest railroad development occurred, the Boston and Worcester R. R. (chartered in 1831) opened nine miles for travel in the summer of 1833; the Boston and Providence R. R. (chartered in 1831) was opened in June, 1834; the Boston and Lowell R. R. (chartered in 1830) was opened in 1835.

From 1830 to 1848, there was a total of 5,205 miles of railroad in the whole United States; but the year 1849 marked the beginning of the great railroad extensions, and by 1860, 30,135 miles had been built.

By 1840, however, it was possible to go from New York by various connecting railroads as far South as Roanoke, No. Car., and as early as 1836, as far West as Utica, N. Y. In 1842, the first long single through route was completed, that from Boston to Albany. In 1850, the Erie R. R. was opened through to Lake Erie; and in 1853, came the first important railroad consolidation, when eleven lines between Albany and Buffalo became the N. Y. Central R. R. By 1854, the Chicago and Rock Island R. R. reached the Mississippi River, and by 1859, the Hannibal and St. Joseph had penetrated to the Missouri River. In 1850, Chicago had only one short railroad. In 1852, it received railroad connection with the East by the completion of the Michigan Central R. R. and the Michigan Southern R. R.; in 1851, the Pennsylvania R. R. extended its system to Chicago; and by 1860, that city had become a railroad centre.

As early as 1830 the South Carolina Canal and Railroad Co. wrote to Daniel Webster asking him to present a petition in the Senate for Federal aid for its railroad: "It will under the fostering care of the General Government be made to constitute a link of union with the rising States of the West, attaching them more strongly through the powerful influences of interest to their Atlantic brethren."

(1) St. 1827, c 77; See *Andover v. Medford Turnpike Corp.*, 18 Pick. 486 (1836).

Another contributing factor to the lapse of turnpikes was the decision of Chief Justice Shaw in 1836, that turnpike corporations were liable for injuries caused even by latent defects in their roads, and irrespective of negligence. See *Yale v. Hampden and Berkshire v. Turnpike Corp.*, 18 Pick. 351.

(2) See *Forward v. Hampshire and Hampden Canal Co.*, 22 Pick. 465 (1839); *Chase v. Sutton Mfg. Co.*, 4 Cush. 182 (1849), for interesting comments on the downfall of the canals.

New York also took a large part in its making. As Judge Thomas strikingly said (1) :

The first puff of the engine on the iron road announced a revolution in the law of bailments and of common carriers. How much Shaw's wisdom and foresight and that clear comprehension of the principles of the Common Law, which enabled him to separate the rule from its old embodiments and to mould it to new exigencies, contributed to build up this law, to give it system and harmony, and a substraction of solid sense, is well known to the profession.

No more superb statement of the manner in which the principles of the Common Law are to be adapted to new conditions of modern life has ever been made than by Shaw, in 1854, in a case involving the liability of railroads as warehousemen; and a quotation from his opinion is worthy of reproduction at length (2) :

The liability of carriers of goods by railroads, the grounds and precise extent and limits of their responsibility, are coming to be subjects of great interest and importance to the community. It is a new mode of transportation, in some respects like the transportation of ships, lighters, and canal boats on water, and in others like that by wagons on land; but in some respects it differs from both. Though the practice is new, the law, by which the rights and obligations of owners, consignees, and of the carriers themselves, are to be governed, is old and well established. It is one of the great merits and advantages of the Common Law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition. . . . The effect of this expansive character of the Common Law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly

(1) *Memoir of Chief Justice Shaw*, by Benjamin F. Thomas—*Mass. Hist. Soc. Proc.*, Vol. X (1867-69).

(2) *Norway Plains Co. v. B. & M. R. R.*, 1 Gray 263 (1854).



analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice which grow out of those circumstances.

The original conception of a railroad was that of an immovable structure graded for the use of vehicles moving on rails provided for the purpose, on which everyone who could procure the proper carriage and apparatus would have the right to travel, on paying a proper toll for the use of the road and conforming to any reasonable regulations.

It was regarded as a better kind of turnpike. Companies chartered to build were primarily construction companies building a road for the use of others; and on these principles the early cases in the courts were decided. (1) With this in view, the early railroad charters were framed practically on the form of the old turnpike corporation charters, and the Revised Statutes of Massachusetts in 1836 included them all together in a chapter headed "Of Turnpikes, Railroads and Canals." It was not until later that this theory was changed by legislation.

Chief Justice Shaw thus stated the early theory (2):

The railroad contemplated by our earliest legislation upon the subject was but an iron turnpike, the use of which was to be paid for by tolls collected of persons travelling upon it. It apparently was not anticipated that the railroad companies were to become themselves the carriers of goods and passengers.

But this idea or policy as to the mode in which railroads were

(1) See *Lake Superior and Miss. R. R. v. U. S.*, 93 U. S. 401, pp. 446, 450.

"It is undoubtedly familiar to most of those whose recollection goes back to that period that railroads were generally expected to be public highways, on which every man who could procure the proper carriages and apparatus would have the right to travel. This was the understanding in England where they originated. . . . Most of the early railroad charters in this country were framed upon the same idea.—Thus the charter of the Mohawk and Hudson R. R. Co. (New York, 1826); and in subsequent charters granted in 1828 and succeeding years, the intent is still more plainly expressed; . . . So, in the early charters granted by Massachusetts and Maine, as late as 1837, New Hampshire as late as 1844. See also the charter of the Camden and Amboy R. R. Co. in New Jersey in 1830, and that of the New Jersey R. R. in 1832, the Philadelphia and Trenton R. R. Co. in Pennsylvania in 1832. . . . In Massachusetts, the right of the public to use them was expressly abrogated by the Act of 1845. . . . The general course of legislation demonstrates the fact that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. The railroads constructed under the early charters are, theoretically at least, public highways to-day."

(2) *Com. v. Fitchburg R. R.*, 12 Gray, p. 187 (1858).

to be used was abandoned before any of our railroads were fully constructed and put into operation. In the act incorporating the Boston and Worcester Railroad Company, (St. 1831, c. 72), powers were given to the corporation for the transportation of persons and goods, and for the purchase of engines and cars for the purpose. These provisions were inserted, it is understood, under the advice of a distinguished member of our profession deeply interested in works of internal improvement. All the subsequent legislation of the Commonwealth has assumed and proceeded upon the ground that railroad companies were to be the carriers of passengers and merchandise upon their respective roads.

And in another case, he said (1) .

It was ascertained very early after railroads were brought into use, that it would not only be attended with great inconvenience, but also with imminent hazard and danger to the public, to allow different and independent railroad companies to run their cars on the same track; and that it was indispensable to the public safety that every car carried upon a railroad should be under the control and direction of the particular company by which it was owned. Accordingly it was provided, that no locomotive engine or other motive power should be allowed to run upon any railroad constructed under authority of this commonwealth, except such as should belong to and be controlled by the corporation owning and managing such road, unless by their consent; and also that every railroad corporation owning a railroad in actual use should be required, at reasonable times and for a reasonable compensation, to draw over their road the passengers, merchandise and cars of any other railroad corporation which had been duly authorized to enter upon or unite their road with it. St. 1845, c. 191, ss. 1, 2. After the enactment of this statute, the only right of the proprietors of other railroads to enter or run their cars upon it was under the special provisions contained in it.

As an illustration of the recent date of Railroad Law, it may be noted that the first railroad case decided in the courts was in New York in 1835—*Camden and Amboy R. R. and Transportation Co. v. Burke* (13 Wend. 611)—in which David Graham, Jr., was counsel against William Anthon. The case involved the question whether the company "as proprietor of a line of steamboats and of a railroad and carriages between New York and Philadelphia" was liable as a common carrier for loss of "wardrobe, music and musical instruments of the plaintiff's minor son,

(1) *Fitchburg R. R. Co. v. Gage*, 12 Gray, p. 396 (1859).

Master Burke, a stage player," (in the words of the declaration).

The earliest cases in Connecticut and Pennsylvania were in 1838, in Maine in 1842, in Vermont in 1847, and in New Hampshire in 1850.

The railroads at first attempted to escape from the rigid Common Law carrier's liability by issuing general notices to restrict their obligations for loss; and the early cases were much concerned with litigation on this subject. It was decided in New York as early as 1838, that such restriction was invalid—*Hollister v. Nowler* (19 Wend. 234), and the United States Supreme Court rendered a like decision in 1848, in *New Jersey Steam Navigation Co. v. Merchants' Bank* (6 How. 344), in a case involving a steamboat and an expressman.<sup>(1)</sup> Later, special notice, brought home to the shipper or passenger, was held to exempt the railroad.

Another much mooted question in the earliest railroad and steamboat cases was whether these new kinds of common carriers were obliged to make delivery of freight at the actual residence or place of business of the consignee. It was to the action of the courts in recognizing usage and convenience as decisive in restricting the railroad's obligations in this respect that the business of expressman owes its origin, about 1838.<sup>(2)</sup>

Incidentally it is to be noted that the express business constituted another new form of common carrier; and as the *Law Reporter* said, in 1849, in a review of *Angell on Carriers*, "the rights and liberties of expressmen have become most important subjects. At one time they deranged our whole postal system; and they have yet to be accurately defined."

No case arose in the United States Supreme Court in which a railroad was a party until 1845—*Maryland v. Baltimore and Ohio R. R.* (3 How. 534), a case involving a stock subscription; not until 1852 was the first railroad accident case decided in that court—*Philadelphia and Reading R. R. v. Derby* (14 How. 468).

As the number of railroad cases decided in Massachusetts practically equalled that of all the other States combined; and as the principles laid down by Chief Justice Shaw practically established the Railroad Law for the country, the gradual growth of

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(1) See *Law of Carriers' Notices* in *Law Reporter*, Vol. XV (1852).

(2) See interesting article on *Power of Usage and Custom to alter the Common Law* by John F. Dillon—*Southern Law Review*, Vol. VII, (1881-82). See also *Law Reporter*, Vol. XIV, p. 134 (1851).

that law from year to year may be substantially traced in the court decisions of that State.

The first mention of the term "railroad" in the Massachusetts Reports was *In Re Wellington* (16 Pick. 87) in 1834—"railroads, a recent form of public works." The first case involving a railroad's action was a suit against the city of Lowell—*Currier v. Lowell* (16 Pick. 171), in 1835, for damages caused by the construction of its road by the Boston and Lowell R. R. The first case in which a railroad was a party was decided in the same year (1835)—*Boston Water Power Co. v. Boston and Worcester R. R. Corp.* (16 Pick. 512; 23 Pick. 360), in which Simon Greenleaf, then Professor in the Harvard Law School, Franklin Dexter, and Richard Fletcher were counsel for the railroad, and Jeremiah Mason and Charles G. Loring for the plaintiff. In this case, the right of a railroad to exercise the power of eminent domain was considered.

The first tort case against a railroad was not decided until 1839—*Lowell v. Boston and Lowell R. R.* (23 Pick. 24). The first ruling that a railroad was a public work and that its property was intended for public use was in *Worcester v. Western R. R.* (4 Metc. 564) in 1842, in which case Pliny Merrick (later Judge of the Massachusetts Supreme Court) appeared for the plaintiff, against Emory Washburn (later Judge of the Court of Common Pleas, Governor of Massachusetts, and Professor in the Harvard Law School) for the defendant.

In this same year, 1842, came the epoch-making decision of Chief Justice Shaw exempting employers from liability to their employees for negligence of fellow employees—*Farwell v. Worcester R. R.* (4 Metc. 49), in which Charles G. Loring appeared as counsel against Richard Fletcher and George Morey.

The most noteworthy fact relative to this case is the extent to which public policy and convenience, formed the grounds of the decision. As Shaw said:

This is an action of new impression in our courts and involves a principle of great importance. . . . It is an argument against such an action, though certainly not a decisive one that no such action has before been maintained. . . . If we look from considerations of justice to those of policy they will strongly lead to the same conclusions. In considering the rights and obligations arising out of particular relations it is competent for courts of justice to regard considerations of policy and public

convenience and to draw from them such rules as will in their practical application best promote the safety and security of all parties concerned.

It is to be recalled that at this date the oldest railroads had been constructed hardly ten years, and they were by no means an assured financial success.<sup>(1)</sup> Undoubtedly the fact that a contrary decision would have imposed a great burden on these struggling institutions had a great effect in influencing the decision reached in this case.

He must be a bold man who would undertake to tell where the doctrine of common employment ends and that of the master's duty to be present begins in any State in the Union. Much of the trouble has arisen from the fact that judges have often failed to perceive that the rule first laid down in Farwell's case was established by a great and wise legislator as a species of protective tariff for the encouragement of infant railway industries. It was a harsh but a plain and simple rule. Pressed by considerations of humanity and public policy the courts began step by step to of the general law of carriers.<sup>(3)</sup> In its preface, it is said :

#### RAILROAD LAW BOOKS.

The first law book which treated of railroads was published in 1849—*Angell on Carriers*—which included railroad law as a part of the general law of carriers.<sup>(3)</sup> In its preface, it is said :

(1) So great were the financial obstacles in the way of railroad promoters, that in most States of the Union, the early railroads were assisted by legislative and municipal grants. It was the lavish expenditure of State money and issue of State bonds in behalf of railroads, which hastened the great commercial panic of 1837, and the subsequent repudiation of the State debts by various States—Maryland, Pennsylvania, Illinois.

In Massachusetts, the Western R. R. which was chartered in 1833 to connect Boston with the West through Albany, did not succeed in raising its capital of \$2,000,000 until 1835, and was obliged to obtain assistance from the State of Massachusetts in 1838 through a State subscription to stock.

(2) See *Future of our Profession* by John M. Shirley, *Amer. Law Review*, Vol. XVII (1883).

In *Stevens v. Little Miami R. R. Co.* in the Hamilton Court of Common Pleas in Ohio in 1850, the court states that "it has no respect for *Priestley v. Fowler* nor the *Farwell case* . . . Sound public policy not in favor."

(3) In the review of this book in the *Law Reporter*, in 1840, (Vol. XII), it is said :

"The law of carriers especially in this country has acquired a peculiar importance. The extent of the American confederacy, that perfect system of free trade which is kept up within its limits and the increased facilities of traveling and transportation contribute to this result. Under these circumstances, it is remarkable that we have not had hitherto any work devoted exclusively to this subject except two English treatises one by Jer-

Since the commencement of the present century, and more especially since American inventive genius has rendered the accelerative and reliable agency of steam subservient to the transportation of commodities and of travellers, the legal duties, liabilities and rights of public carriers of both things and persons have become subjects of vastly more interest and greater moment than before this era was realized or even generally anticipated. . . . So instrumental have railroads proved, in combination with the employment of the agency just mentioned, in cementing in this connection and dependence sections of the country far removed from each other, that the interest of the mercantile and traveling public, and more especially of the legal profession, in the direction of the subject of the following work has attained its acme.

Six years later, in 1855, was published Judge Milo L. Bennett's edition of an English work Shelford's *Law of Railways*—"the best treatise we have on the subject," said the *American Law Register* (Vol. III).

In 1857, came the first American text-book devoted entirely to the subject—Edward L. Pierce's *Review of American Railroad Law*—"the first book of the kind upon a subject of increasing interest" said the *Law Reporter* (Vol. XX).

In 1858, appeared Judge Isaac F. Redfield's book on *Railways*, in the preface to which the author speaks of this "law appropriate to a department of enterprise which combines the grandest material energies of the age and unfolds views of national greatness which patriotism delights to contemplate." (1)

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emy published in 1815, one by Jones (George Frederic) published in 1827. The only other sources to which we can recur for an exposition of this branch of the law are the leading case of *Coggs v. Bernard* (2 Lord Raym. 909) by which Lord Chief Justice Holt incorporated the whole of the civil law on the subject of bailments into the common law of England and the two treatises, English and American, on the *Law of Bailments* the first by Sir William Jones and the latter by the late Mr. Justice Story.

. . . . In Lord Holt's decision, however, and in each of the treatises we have named, the law of carriers is considered in its place only as a part of the comprehensive law of bailments. Besides, so great have been the changes in the mode of travelling within the past few years that even the recent work of Mr. Justice Story may require some modification."

(1) In a review of this book, the *Law Reporter* (Vol. XX) said:

"To many of the profession the time has been since they began to practice that a book with such a title would have been a matter of new and curious speculation. . . . As a single illustration in the first three volumes of the U. S. Digest bringing down the decided cases to near 1847 there were only two cases to be found under the head of Railroad.

The two next volumes contain only about 50 of these cases. So rapidly had they multiplied, however, that the volume for the single year 1855, containing the cases in 48 volumes of Reports embraces as many under the

## CORPORATION LAW.

Probably no economic institution was more affected in its growth, and no branch of law received greater impetus, between the years 1830 and 1850, through judicial decisions, than that of corporations; and the great increase in number and influence of corporations was largely affected by the doctrines laid down by the courts.

In the earlier years, the corporations were much restricted in their growth by statutory provisions imposing on stockholders the liability of partners. Notwithstanding these restrictions, as early as 1826, Kent in his *Commentaries*(1) referred to "the propensity in modern times to multiply civil corporations, especially in the United States, where they have increased in a rapid manner and to a most astonishing extent. The various acts of incorporation . . . constitute a mighty mass of charters which occupy a large part of the volumes of the statute law. The demands for acts of incorporation is continually increasing and the propensity is the more striking as it appears to be incurable; and we seem to have no moral means to resist it, as was done at Rome by the unshaken determination of the Emperor Trojan."

Of the policy up to 1826, Kent wrote(2):

There has been a disposition in some of the States to change in an essential degree the character of incorporated companies, by making the members personally responsible in certain events and to a qualified extent for the debts of the company. This is intended as a check to improvident conduct and abuse and to add to the general security of creditors; and the policy has been pursued to a moderate and reasonable degree only in Rhode Island, New York, Maryland, and South Carolina.

In New York, by statute of 1811, stockholders were liable to the extent of their stock holdings for all debts of the corporation due on its dissolution. . . . The tendency of legislation and

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head of Railroad within some two or three as are found in the digests of the whole 650 volumes just mentioned.

No better or more striking illustration of the flexibility and expansion of the common law to new circumstances can be offered than the readiness and ease with which it supplies the rules and elements of jurisprudence by which the multifarious interests and relations upon the subject of railways are regulated. And what, moreover, ought to increase our confidence in and respect for the common law is the general uniformity which prevails in the decision of these questions as they have arisen from time to time in the courts of some 30 different and independent States."

(1) *Kent's Commentaries*, Vol. II, p. 219-220 (1st ed. 1827).

(2) *Kent's Commentaries*, Vol. II, p. 273, note b (4th ed. 1844).

judicial decision in the several States is to increase the personal responsibility of stockholders. . . . and to give them more and more the character of partnerships with some of the power and privileges of corporations.

Legislation of this character had been the standing policy of Massachusetts—the State of the greatest number of manufacturing corporations—from 1809 to 1827.(1) But in his message to the Legislature, June 2, 1825, Governor Levi Lincoln recommended a relaxation of this policy, saying:

As the law now exists it is to be feared that no inconsiderable portion of advantage which would result from the employment of capital in a profitable business and from the encouragement of an industrious population is lost to the Commonwealth.

In this age of great undertakings and of strenuous competition for pre-eminence in local advantages and influence, it is surely wise to regard with care the permanent resources of the Commonwealth. These will be found especially to consist in the profitable investment at home of the monied capital of our wealthy citizens, and in the encouragement of employment thereby of an ingenious, industrious and virtuous population.

And in his message of May 31, 1826, he said:

The number of corporations already created and the immense amount of capital employed in their operation must prevent the possibility hereafter of a successful competition with them in business by individual means, and presents the single inquiry whether these public establishments can advantageously be multiplied and encouraged. The period has long since passed in which the manufacturing interest could be regarded as unfavorable to commerce or inconsistent with the prosperity of an agricultural people.

“The effect has been to drive millions of capital into other

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(1) See remarks of Chief Justice Parker in *Marcy v. Clark*, 17 Mass. 335, in 1821:

“The Legislature have thought fit and we think wisely to subject the property of all members of these corporations to a liability for the debts of the company. By this, in fact, they only continue the principle of co-partnership in operation; and considering the multitude of corporations which the increasing spirit of manufacturing gives rise to, regard to the interest of the community seems to require that the individuals whose property thus put into a common mass enables them to obtain credit universally, should not shelter themselves from a responsibility to which they would be liable as members of a private association.

Since this statute was enacted all who deal with such companies look for their security to the individual members rather than to this joint stock.”



states for investment."—"The unreasonable severity of the present laws is a subject of general complaint," said writers in the *American Jurist*, in 1829 and 1830.(1)

By an act passed in 1830, however, Massachusetts began to adopt a more liberal policy towards stockholders. At the same time, nevertheless, and even in those early days of corporate activity, there was generally prevalent a fear of the increase of corporations, an example of which may be found in the *American Jurist*, in October, 1830:

In our republics, they are still more numerous; and it is difficult to set bounds to the general desire to increase them . . . Unless restrained by legislative enactment, judicial construction, or the good sense and discretion of the stockholders, they will absorb the greatest part of the substance of the Commonwealth. The extent of the wealth and power of corporations among us demands that plain and clear laws should be declared for their regular restraint; for without a salutary and strict control over them everyone may be compelled to adopt the fears of the Roman Emperor who when requested to institute a fire company of 150 men on an assurance that they should not exceed their powers beyond the objects of the association, refused the grant, observing that associations had greatly disturbed the peace of cities and whatever name he gave them they would not fail to be mischievous (2 Kent 217).

The doctrine of corporations in this country, on account of their extent as well as the defective state of their existence and operation, presents a most interesting field of inquiry to American jurists, and demands that their best energies should be applied to the subject and that corporations may be protected and wisely directed in effecting the great public good of which they are capable and restrained from inflicting the public and private evils within their powers and to which they are often tempted by their own views of interest. . . . The courts of Massachusetts have made many decisions from which it must be inferred that they favor the doctrine and are inclined to adopt it that corporations have no powers but such as are plainly granted in their charters or are clearly necessary to effect the useful purposes for which they were created. Such rules of construction can hardly be considered yet as established anywhere in their full extent.

In the courts above referred to (N. Y., U. S., Mass.), the Com-

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(2) See *Manufacturing Corporations; Constitutionality of Corporators Liability Laws*, by Charles G. Loring in *American Jurist*, Vol. II (1829); Vol. IV (1830); Vol. V (1832).

See also, St. 1808, c 65; St. 1817, c 183; St. 1821, c 38; St. 1822, c 638; St. 1826, c 138; St. 1829, c 53; and *Child v. Coffin* 17 Mass. 64 (1820).

mon Law incidents to corporations are sometimes cited with approbation, and in other State courts they are generally referred to without qualification. The evident utility of the new construction will probably soon recommend it to general adoption.

When such becomes the declared law of the States, and when it shall become the law that corporations are generally liable for the acts of their authorized agents; for contracts by implication; for all wrongs and injuries that they are capable of inflicting; and for all injurious omissions to perform their duties, there will be no longer need of statutes of mortmain and wills; or constitutional impediments or restraints to the multiplication of corporate charters. It might still, however, be wise for Legislatures to reserve more direct control over corporations of future creation than they are accustomed to do in most of the States. . . .

When these doctrines shall become fully established and Legislatures grow careful to reserve visitorial powers in granting charters for civil corporations, the fear and apprehension of corporations now existing and too justly forced by experience into the public mind, will probably subside. Such fears have induced the Legislatures in some States to adopt measures which should and to a great extent do deter the public from encountering the perils resulting from the ownership of corporate stocks.(1)

After 1827, the more liberal legislation limiting stockholders' liability promoted the turning of partnerships into trading and manufacturing corporations. The protective tariffs and the increasing production of coal were a great factor in the increase of these corporations. The expiration of the charter of the United States Bank in 1836 caused large numbers of State and private banks to be incorporated. Life insurance corporations were just coming into existence. Fire insurance corporations were being much more extensively developed. The era of railroad corporations began in 1830.

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(1) Governor Lincoln himself, in vetoing a bill to authorize the incorporation of the Mozart Association in Salem, with power to hold real estate to the value of \$10,000, said Feb. 16, 1827:

"The course of legislation for several of the last years has a tendency to absorb individual property in the capital of corporations and thereby to destroy its future divisibility and voluntary disposition to an extent I believe which is hardly apprehended by the community. It may well deserve regard to what consequences an unrestricted indulgence in this policy may lead. . . . The worst evils of a monopoly of wealth and possessions in corporations on the one hand and of consequent poverty and dependence on individuals on the other will commence and be aggravated, until by the intervention of statutes of mortmain and other violent legal enactments, or by popular excitement and revolution, the grievous and intolerable pressure of corporate power over individual possession shall be removed and property again be restored to those who by the laws of nature had the original right to its enjoyment."

By 1831, the body of Corporation Law had become so large as to demand a text book, and in that year appeared the first American and the first modern book on the subject—*Angell and Ames on Corporations*. In the preface, the authors stated:

The inconvenience experienced from the want of a work of reference upon the legal rights and obligations which grow out of the relations between a body corporate and the public and between a body corporate and its members has in this country long been a subject of complaint.

And they cite a comment by Judge Roger in *Bushel v. Commonwealth Ins. Co.* (15 Serg. and Rawle 176):

With the multiplication of corporations which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law respecting them. . . . This change of law has arisen from that silent legislation by the people themselves which is continually going on in a country such as ours, the more wholesome because it is gradual and wisely adapted to the peculiar situation, wants, and habits of our citizens.(1)

It is to be noted that, at this time, most of these corporations were created by special charters; for general incorporation acts existed in but few States.(2) The first general statute had been enacted in Pennsylvania in 1791, authorizing incorporation generally of literary, charitable, and religious associations. In New York, a general act for public libraries was passed in 1796, and for business corporations in 1811; but by the constitution of 1821, the people of the State, alarmed at the tremendous increase of corporations, provided that no charter should be granted except by a two-thirds vote of each branch of the Legislature. Georgia enacted general manufacturing corporation acts in 1843 and 1845. New York enacted the broadest general corporation act in the country in 1848; and in 1849, Pennsylvania enacted a general business corporation act. Massachusetts had no general manufacturing or banking corporation acts until as late as 1851. As the *Law Reporter* stated in that year (Vol. XIV):

(1) Chief Justice Shaw in *Tisdale v. Harris* (20 Pick. 1) in 1838 holding stock certificates within the Statute of Frauds said:

"These companies have become so numerous, so large an amount of the property of the community is invested in them and as the ordinary indicia of property arising from delivery and possession cannot take place, there seems to be peculiar reasons for extending the provisions of the statute to them."

(2) See *Address of Henry Hitchcock in Amer. Bar Ass. Proc.* Vol. X.

In Massachusetts, similar provision existed before in regard to parishes and religious societies, wharves and some other real estate ownerships, lyceums and cemeteries, and some other specified cases; but it was taken for granted that such provision could not be safely applied, as it had been done in other States, to corporations generally, and especially those of a trading or business nature. The Legislature has overstepped this line in the case of manufacturing companies and banks, and we think wisely. We believe. . . . we shall see laws passed hereafter to meet the analogous cases of insurance and railroad corporations.(1)

A general insurance act was not passed in Massachusetts until 1856; a general railroad act, until 1872; and a street railway act, until 1874.

The influence of the decision in the *Dartmouth College Case* on Corporation Law during this period was very pronounced. That case, deciding that a corporate charter was a contract and within the protection of the United States Constitution, gave a great impetus to the creation of corporations; and so many valuable rights were irrevocably granted away in corporate charters by the State Legislatures, that a movement began to change this condition of affairs. Acting on a precedent adopted on the suggestion of Chief Justice Parsons, as early as 1809, in an act incorporating manufacturing companies, the Legislature of Massachusetts in 1830 passed a general statute relating to all corporations, and making every charter thereafter granted subject to the right of the Legislature to alter, amend or repeal. New York had already inserted a similar clause in its constitution of 1826. Connecticut and other States had been accustomed for several years to append such clauses to all special corporate charters. Wisconsin followed Massachusetts in 1848, and California in 1849. Many States, however, still hesitated, especially those that were undeveloped and had the greatest need for corporations.(2)

(1) The number of special charters to manufacturing corporations in Massachusetts is stated in the *Law Reporter*, Vol. XXII, in 1859, as follows: between 1780 and 1809, 9; 1800-1817, 100; 1780-1835, 500; 1835-1859, about 30 per annum.

(2) *Rise and Probable Decline of Private Corporations*, by Andrew Allison, *Amer. Bar Ass. Proc.*, Vol. IV (1881).

It is interesting to note that the fear of corporations continued extremely prevalent. It was well stated by a Massachusetts lawyer of prominence, Robert Rantoul, Jr., in an argument, made in 1835 in the Massachusetts Legislature, in protest against a special charter to an iron and steel company with a capital as large as \$500,000:

"The evil of incorporation had become so great that the justice of the opinions expressed in Gov. Lincoln's message (vetoing the incorpora-

In 1838, a question of corporate law arose, the decision of which was likely to affect the course of commercial dealings in the United States to a greater degree than any decision since that in the great steamboat case of *Gibbons v. Ogden*, in 1824.

In the United States Circuit Court in Alabama, a railroad company incorporated in Louisiana had brought suit on a bill of exchange made and discounted by it in Alabama. The question had thus been presented of the power of a corporation to make and sue on a contract, signed outside the State in which it was chartered. To the surprise and consternation of the business interests of the country, Mr. Justice McKinley of the United States Supreme Court, sitting in the Circuit Court, decided that a corporation had no power to do business in a State other than that in which it was incorporated. The effect produced by this decision is graphically described by Judge Story in a letter to Charles Sumner, June 17, 1838(1):

My brother McKinley has recently made a most sweeping decision in the Circuit Court in Alabama which has frightened half the lawyers and all the corporations of the country out of their propertities. He has held that a corporation created in one State has no power to contract (or, it would seem, even to act) in any other State either directly or by an agent. So banks, insurance companies, manufacturing companies etc., have no capacity to take or discount notes in another State or to underwrite policies

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tion of the Mozart Society) was immediately acknowledged by the Legislature. This evil has increased; it is infinitely greater now than it was in 1827; and by and by the subject will become the first in the eye of the people. The people will stand up against corporations. They will say, "we will see whether the citizens of the Commonwealth are to govern themselves or are to be governd by corporations". . . . A great party will grow up against them, and then corporations must look to themselves. . . . Agrarianism, levelling, Jacobinism, war of the poor against the rich—these are the cries against me. This is stale trash. . . . In all the earliest manufacturing corporations the stockholders were mostly leading federalists, and the whole power of the corporation was federal power."

Two years later, in 1837, the same apprehension as to monopolies and wealthy corporations appeared judicially in the opinion given by Judge Marcus Morton of the Massachusetts Supreme Court in *Alger v. Thatcher* (19 Pick. 51.) This was the first well considered case on restraint of trade decided in the United States; and Judge Morton said:

"The law . . . is found on great principles of public policy and carries out our constitutional prohibition of monopolies and exclusive privileges . . . Such contracts . . . prevent competition and enhance prices. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations who have the means unless restrained by law to exclude rivalry, monopolize business and engross the market."

(1) Unpublished letter in *Sumner Papers* in Harv. Coll. Library.

or to buy or sell goods. The cases in which he has made these decisions have gone to the Supreme Court. What say you to all this? So we go!

As the Bank of the United States and other moneyed corporations had, for many years, been in the habit of discounting bills in States throughout the country, this decision opened the door to widespread repudiation of their obligations by debtors whose contracts were made in States other than the chartering State. These debtors at once took advantage of the defence thus offered to them. Manufacturing and trading corporations hesitated to continue to do business in outside States. The business of the fire and life insurance companies which were just being organized for the first time to any great extent, was curtailed. General commercial confusion ensued. The disastrous result of this decision was also enhanced by its being rendered at a time when the effects of the great financial panic of 1837 were still being severely felt.

Ex-Chancellor Kent and other eminent lawyers, being consulted, gave their opinions against the doctrine laid down by Judge McKinley.<sup>(1)</sup> Steps were at once taken to carry the case to the United States Supreme Court. Accordingly, in 1839, the great case of *Bank of Augusta v. Earle* (13 Peters 519) was argued before that court by David B. Ogden of New York, Daniel Webster of Massachusetts and John Sergeant of Pennsylvania against Charles J. Ingersoll of Pennsylvania and William H. Crawford of Georgia<sup>(2)</sup>:

The arguments were largely based on considerations of public policy and economics, the counsel for the plaintiffs arguing with great ardor the inconvenience, mischief, injustice and injury which would result to commerce and trade, if the decision of the Circuit Court should be upheld.

Thus David B. Ogden argued:

A deeper wound will be inflicted on the commercial business of the United States than it has ever sustained. The principal means by which the commercial dealings between the States of the United States and Alabama is conducted will be at an end; and there will be no longer the facilities for intercourse for the purposes of traffic by which alone it is prosperous and beneficial. .

<sup>(1)</sup> See opinion of Kent, printed in full in *Law Reporter*, Vol. I, July 1838.

<sup>(2)</sup> There were three cases consolidated for argument—*New Orleans and Carrollton R. R. Co. v. Earle*, *Bank of the United States v. Earle*, and *Bank of Augusta v. Earle*.

. . . The purchases of bills of exchange in that State are extensively made by the agents of Corporations of other States; thus by the competition which is produced, the rates of exchange are kept in due proportion to those of other States. The large productions of cotton in that State are thus enabled to realize to the planter a proper and an equal price to that obtained by the planter in the neighboring States. The proposition in the Circuit Court . . . is that a corporation of one State can do no commercial business, can make no contract and can do nothing in any State of the Union but in that in which it has been created. The proposition is the more injurious as in the United States associated capital is essentially necessary to the operations of commerce and the creation and improvement of the facilities of intercourse which can only be accomplished by large means. . . . One of the most important objects and interests for the preservation of the Union is the establishment of railroads. Cannot the railroad corporations of New York, Pennsylvania or Maryland make a contract out of the State for materials for the construction of a railroad? Cannot these companies procure machinery to use on their railroads, in another State?

And Daniel Webster said:

A learned gentleman on the other side said the other day that he thought he might regard himself in this cause as having the country for his client. . . . I agree with the learned gentleman, and I go indeed far beyond him in my estimate of the importance of this case to the country. . . . For myself, I see neither limit nor end to the calamitous consequences of such a decision. I do not know where it would not reach, what interests it would not disturb, or how any part of the commercial system of the country would be free from its influence, direct or remote.

On the other side, Charles J. Ingersoll pointed out the danger of increasing the power of corporations in this country, and insisted that a State ought not to be forced, by any doctrine of comity or otherwise, to allow a corporation of another State to do business within its borders:

It is true that in order to keep pace with the flood of these associations, the Common Law with its characteristic adaptation to exigencies has counteracted their intolerable privilege by holding them to personal liability. . . . Power to pronounce it (the Common Law) impolitic, to break in upon or discard it, if it exists in any court should be sparingly exercised. . . . These United States as such can have no private corporation; and if upon false notions of commercial intimacy they are to be consolidated by traders, corporations and professional dogmas, con-

trary to the true spirit of our political institutions, not only the rights of all the States but the Federal Constitution itself will be at an end. . . . It is confidently submitted to the Court that it will best fulfil its duties by holding the States united by sovereign ties; by the State remaining sovereign and the corporations subject; not by sovereign corporations and subject States. . . . If courts are bound by Common Law to restrict corporations to the specific purposes of their creation, they are bound by the same Common Law to prevent their wandering out of place as much as out of purpose. . . . This is perhaps a question rather of politics than of jurisprudence.

The Court, in an opinion rendered by Chief Justice Taney, overruled the Circuit Court and denied the doctrine of the confinement of a corporation to business within the State of its charter. From the decision of this case, therefore, the great development of interstate corporate business may be said to date.

The following interesting comment is made by William M. Meigs in his *Life of Charles J. Ingersoll*:

This was a very important case—rather one of politics or public law than of mere private right between suitors. Mr. Ingersoll . . . entered into the case with intense interest . . . and was evidently disappointed at losing, and wrote to Mr. (Henry D.) Gilpin to that effect, but was told in reply that he should not be worried at his inability to defeat a corporation when the whole country had to bear them, as Sinbad had his burden. . . . The prevailing view today probably is that the decision was both right and desirable; but such questions were then far more open to doubt in the public mind than now; and the thoughtful observer may well question in view of the unrest now so prevalent (1897) and the so general feeling that organized capital has too much power, whether our country might not have been more sound at the core if some of the most important decisions had gone the other way.

One other decision of the United States Supreme Court during this period had immense effect on the growth of modern corporate commerce.

From 1809 to 1844, it had been held by that Court ever since the decision of Chief Justice Marshall in *Bank of the United States v. Deveaux* (5 Cranch 61) that the Federal Courts had no jurisdiction on the ground of diverse citizenship, in a case where a corporation was a party, unless all the individual stockholders of the corporation were citizens of a State other than that of the other party to the suit. Such a doctrine of course greatly re-



stricted the rights of a corporation to sue in a Federal Court, and made such suit almost impossible.

In 1844, however, in *Louisville R. R. v. Letson* (2 Howard 557) Chief Justice Taney delivered an opinion, taking the broad ground that a corporation, although an artificial person, was to be deemed an inhabitant of the State of its incorporation, and to be treated as a citizen of that State for purposes of suit. Of this case, Judge Story wrote to Ex-Chancellor Kent, Aug. 31, 1844:

I equally rejoice, that the Supreme Court has at last come to the conclusion, that a corporation is a citizen, an artificial citizen, I agree, but still a citizen. It gets rid of a great anomaly in our jurisprudence. This was always Judge Washington's opinion. I have held the same opinion for very many years, and Mr. Chief Justice Marshall had, before his death, arrived at the conclusion, that our early decisions were wrong.

In 1853, in *Marshall v. Baltimore & Ohio R. R.* (16 Howard 314) it was held that there was a conclusive presumption of law that all the shareholders were citizens of the State of incorporation; and this was further strengthened by a decision in 1857, in *Covington Drawbridge Co. v. Shepherd* (20 Howard 227) that parties were to be held estopped from denying such citizenship.<sup>(1)</sup>

These decisions not only opened the door wide to interstate commerce by corporations, but they were of vast importance in breaking down the barriers sought to be erected by the political supporters of the narrow States' rights doctrines, and in increasing the strength of the Federal power.

In one direction, the great growth of corporations made necessary the development of a branch of corporate laws to which little attention had hitherto been paid—the limits of the scope of corporate action and the doctrine of ultra vires. As stated in the preface to the first book on this subject, *Brice on Ultra Vires* published in 1874, it is said:

The doctrine of ultra vires is of modern growth. Its appearance as a distinct fact and as a guiding and rather misleading principle in the legal system of this country dates from about

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(1) For interesting articles on this subject see *A Legal Fiction with its Wings Clipped*, by S. E. Baldwin in *Amer. Law Review*, Vol. XLI (1907). *Abrogation of Federal Jurisdiction*, by Alfred Russell, *Harv. Law Review*, Vol. VII (1892). *Corporate Citizenship a Legal Fiction*, by R. M. Benjamin, *Albany Law Journal*, Vol. LXIX (1907).

1845, being first prominently mentioned in the cases, in equity of *Colman v. Eastern Counties Ry. Co.* (10 Beavan 1) in 1846, and at law of *East Anglian Ry. Co. v. Eastern Counties Ry. Co.* (11 C. B. 775) in 1851.

In the United States Supreme Court, however, in 1858, it was referred to as "not a new principle in the jurisprudence of this court" (1).

This period, 1830-1850, also witnessed the beginning of the formation of the law as to the financial management of corporations—questions relating to the status of shares of stock, over-issues, fully paid stock, coupon bonds and the like, the law as to which, however, was not finally put in satisfactory shape until after 1860. The rudimentary conditions of the law as to the financing of corporations may be gathered from the following statements in *Redfield on Railways*, published in 1858:

But few questions in regard to the subject of railway investments have been definitely settled in this country. . . .

There have been some expedients resorted to for purpose of enabling companies to complete their works without the requisite capital bona fide subscribed paid, which, as they do not seem to have come much under discussion in the judicial tribunals of the country, we could do little more than allude to, but which have so serious a bearing upon the safety and permanent value of railway investments that we could not perhaps with perfect propriety altogether pass over them. . . .

There is very little law as yet in this country as to the power of a railway corporation to mortgage the property and franchise without statutory authority.

The subject of the duties and liabilities of officers of a corporation to its stockholders was only just being considered.

In 1847, a question, novel then, but engaging much of the attention of courts in recent times arose in the case of *Smith v. Hurd* (12 Metc. 371), in which stockholders of the Phoenix Bank, which had failed disastrously, sued the directors for negligence. The case was argued by William H. Gardiner and Professor Simon Greenleaf against Benjamin R. Curtis and Benjamin Rand. Chief Justice Shaw, holding that no action would lie, said:

This certainly is a case of first impression. We are not aware

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(1) *Pearce v. Railroad Co.*, 21 Howard 441.

that any similar action has been sustained in England or in any of the courts of this country. . . . The circumstance that no such action has been maintained would certainly be no decisive objection, if it could be shown to be maintainable on principle. But the fact that similar grievances have existed to a great extent and in numberless instances where such an action would have presented an obvious and effective remedy affords strong proof that, in the view of all such suffering parties and their legal advisers and guides, there was no principle on which such an action can be maintained.

The above very general survey makes it clear that this period was distinctly a formative one, in which great judges on the bench had an everlasting effect on the destinies of the country.

## CHAPTER XXXII.

### THE ANTI-SLAVERY PERIOD I.

No proper understanding can be had of the Law School life during the exciting twelve years prior to the Civil War, without an appreciation of the local political and social conditions in Boston and Cambridge.

The leading men of Boston, and of what may be called the Harvard College circle, were intensely clannish. They were closely related by constant intermarriages(1). Views, movements, and men, originating from outside, met with little favor from what Oliver Wendell Holmes happily termed, "the Brahmin caste". Conservatism reigned supreme;—tolerating such radicalism as the Transcendentalist movement only because Emerson and his disciples were of strictly native origin. "A vast amount of toryism and donnishness everywhere;" wrote Thackeray after his visit to Boston in 1853. Foreign radical movements were rarely endorsed; and even the popular uprisings in Europe of 1840-1850 received little sympathy from the people of Boston.

Sumner, writing April 14, 1848, said, "The feeling in Boston is contrary to the Revolution. The commercial interests are disturbed by the shock that property has received. Mr. Webster, I am told, condemns the Revolution"; again, in 1852, "The Commonwealth is for Kossuth; the City is against him. The city is bigoted, narrow, provincial and selfish; the country has more the spirit of the American Revolution."

Men who held broadly democratic, law reform, or anti-corporation views, like the talented lawyer, Robert Rantoul, Jr., were frowned upon. The narrow horizon of the old Federalist merchants and shipowners still hemmed in their descendants; and

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(1) The members of society were closely related by intermarriage. "Thus the Ticknor, Eliot, Dwight, Guild and Norton families were connected by marriage, and Mr. Samuel Eliot was a near kinsman of the Curtis family. Similar ties of blood and marriage united the Sears, Mason, Warren, Parker and Amory families, and also the Shaw, Sturgis, Parkman and Perkins families. Another group was the Sturgis, Perkins, Cabot, Forbes, Cary, Gardiner and Cushing families. See *Memoirs and Letters of Charles Sumner*, by Edward L. Pierce.

maintenance of the sources of their wealth was the chief impulse in their politics. As Edward L. Pierce wrote(1) :

The capitalists, like Nathan Appleton and Abbott Lawrence were greatly interested in a protective tariff and its maintenance, then the one end of their politics. It was all important to their interests to keep the Whig party, north and south, united in support of the tariff, and with reference to a market to keep on good terms with the southern people. A southern slaveholder, or his son at Harvard, was more welcome in society than any guest except a foreigner. Southern planters tarried for weeks at the Tremont House . . . and from year to year there registered among its guests the well known names of the Allstons, Hegers, Izards, Rhetts. . . . The deference to rich southern planters was marked.

Adams, in his life of Richard H. Dana, Jr., describes the situation in Boston as it affected a lawyer's career(2) :

To be an avowed Free Soiler in Boston between the years 1848 and 1856, implied a good deal. Society, as it is called,—that is, the wealth, culture and professional and business activities of Boston,—in short, the large majority of those "best people" towards whom Dana felt an instinctive affinity, were Whigs, and devoted personal as well as political adherents of Mr. Webster. A certain thin, colorless anti-slavery sentiment had always been current and fashionable among them. . . . But it was a mere sentiment, having no hold either in conviction or in material interest. On the contrary, so far as material interests were concerned, a great change had recently taken place. The manufacturing development of Massachusetts had been rapid, and a close affiliation had sprung up between the cotton spinners of the North and the cotton producers of the South,—or, as Charles Sumner put it, between "the lords of the loom and the lords of the lash." . . . Under the guise of loyalty to the Union and the Constitution, social and business Boston by degrees became, in its heart, and almost avowedly, a pro-slavery community; and it so remained until 1861. . . .

An abolitionist was looked upon as a sort of common enemy of mankind; a Free Soiler was only a weak and illogical abolitionist. . . . Sumner and Dana, for instance, had long been frequent and favored guests in the house of Mr. Ticknor. After they became pronounced Free Soilers, they soon ceased to be seen there; and, indeed, things went so far that all social relations between them and the family of their former host were broken off. So it was generally. . . . Moreover, nearly all the wealth and

(1) *Memoirs and Letters of Charles Sumner*, by Edward L. Pierce.

(2) *Richard Henry Dana*, by Charles Francis Adams, Vol. I (1891).

the moneyed institutions of Boston were controlled by the conservatives; and among the moneyed institutions were the marine insurance companies. The ship-owners and merchants were Whigs, almost to a man. It is, therefore, safely within the mark to say that Dana's political course between 1848 and 1860 not only retarded his professional advancement, but seriously impaired his income. It kept the rich clients from his office. He was the counsel of the sailor and the slave,—persistent, courageous, hard-fighting, skilful, but still the advocate of the poor and the unpopular. In the mind of wealthy and respectable Boston almost any one was to be preferred to him,—the Free Soil Lawyer, the counsel for the fugitive slave, alert, indomitable, always on hand.

This same general attitude prevailed both in Harvard College and the Law School, described in a letter from Dana, to the noted New York lawyer, Daniel Lord, Jan. 26, 1854:

I have a particular dislike to subserviency, even appearance of subserviency, on the part of our people to the slaveholding oligarchy. I was disgusted with it in college, at the Law School, and have since been in society and politics. The spindles and the day book are against us just now, for Free Soilism goes to the wrong side of the ledger. The blood, the letters and the plough, are our chief reliance.

Such being the conditions, it is not surprising that a large portion of the ruling Whig party was not in sympathy with the Anti-Slavery movement, and closed their doors to Sumner and others of his way of thinking, when they became Free Soilers. On the other hand, a strong body of young and middle aged men was forming, filled with the enthusiasm of the Free Soil movement—Richard H. Dana, Jr., Charles Francis Adams, John G. Palfrey, Samuel G. Howe, Horace Mann, Charles W. Ellis, Samuel E. Sewall, Ellis Gray, Henry Wilson, George F. Hoar; and with these may be counted such of the Cambridge circle as Lowell and Longfellow. The more rabid of the abolitionist agitators, like William Lloyd Garrison, Theodore Parker, and Wendell Phillips, constituted another faction in the community.

In the Nation, events of vast import to the future were crowding on the scene. The Mexican War had ended, when on July 4, 1848, peace had been proclaimed with Mexico. Nine days before the Peace Treaty had been signed, a Swiss emigrant digging a mill race on the ranch of Colonel Suter near Sacramento, California, had turned up gold. Within a few months a stream of men, young

and old, was pouring from the Northern and Eastern States across the plains, around the Horn and over the Isthmus. The slave holding States, less enterprising, lost their opportunity, and in September, 1849, California adopted a constitution as a free State. The attempts of the South to secure the remainder of the new territory for slavery became thenceforward the absorbing subject in men's thoughts throughout the country. The older statesmen were passing off the scene. John Quincy Adams died Feb. 23, 1848; Harrison Gray Otis, Oct. 28, 1848; John C. Calhoun, March 31, 1850; Henry Clay, June 29, 1852; and Daniel Webster, October 24, 1852.

The first convention of the Free Soil Party was held in Buffalo in August, 1848, nominating Martin Van Buren for President and Charles Francis Adams for Vice President. In Massachusetts, a Free Soil Convention, in September, nominated Stephen C. Phillips for Governor. In the fall of 1848, occurred the presidential campaign, Zachary Taylor of Louisiana being the Whig candidate and Lewis Cass of Michigan, the Democratic. In this campaign, the students in the Law School took an active interest. The representation at the School from the Southern States was numerous at the time; and the Louisiana students were especially zealous for Taylor. The political rallies held in Cambridge, therefore, were largely attended by the law students. At one of these meetings in the fall of 1848, Abraham Lincoln, then the only Whig member of Congress from Illinois, delivered a speech vigorously attacking the new Free Soil party. At another meeting held by Free Soil partisans, Charles Sumner made a speech, of which Longfellow wrote in his diary Oct. 26, 1848:

Sumner made a Free Soil speech in Cambridge, ah me! in such an assembly: It was like one of Beethoven's symphonies played in a saw mill. He spoke admirably well, but the shouts and the hisses of the vulgar interruptions grated on my ears. I was glad to get away.

The disturbance referred to was caused, it is said, largely by the Southern law students, and Sumner was forced to turn on them by exclaiming finally: "The young man who hisses will regret it ere his hair turns grey. He can be no son of New England; her soil would spurn him."

Three years later, Horace Mann and Ralph Waldo Emerson met with a similar experience, described by Longfellow as follows:

May 14, 1851, went to hear Emerson on the Fugitive Slave Law at the Cambridge City Hall. Some noise and shoutings and hisses for every body in general. The first part of the address was grand; so was the close. The treatment of Webster I did not like so well ("Every drop of blood in this man's veins," he said "has eyes that look downward"). It is rather painful to see Emerson in the arena of politics, hissed and hooted at by young law students.

In 1850, the breach between the Slavery men and the Free Soilers had become even wider; and the more or less neutral or Union policy of the Whig party could not restrain the growing intensity of political feeling. The reception accorded by many of his former supporters to Daniel Webster's great Union speech of March 7, 1850, foreshadowed to the country, even then, the "irrepressible conflict".

In Massachusetts, men were divided from each another, according to their approbation or disapprobation of that single speech—on the one side the great body of Webster's political friends, the conservative members of the Whigs and Democrats, on the other, the new third party, composed largely of seceders from the Whigs, with Democrats like Robert Rantoul, Nathaniel Banks, and Marcus Morton.<sup>(1)</sup> The one party welcomed Webster back from Washington with an enthusiastic reception and an address by Benjamin R. Curtis, April 29, 1850.<sup>(2)</sup> The other party voiced its views in Whittier's poem of *Ichabod*, directed against Webster; in Ralph Waldo Emerson's description of Webster as "a deal elephant;" in Sumner's bitter phrase "A Strafford or an Archangel ruined"; and in such sentiments as appeared in Longfellow's diary:

March 8, 1850. A brief report comes of Webster's long expected speech. It makes us very sad to read it. Is it possible! Is this the Titan who hurled mountains at Hayne years ago.  
 March 9. Went to town. Found everybody complaining of Webster, "Fallen, fallen, fallen from his high estate", is the universal cry in various phraseology. Yet what has there been in Webster's life to lead us to think that he

(1) See *Life and Letters of Benjamin R. Curtis*, Vol. I.

(2) George Ticknor wrote, in 1850:

"As Judge Wayne says, 'the demonstration over Webster's speech is triumphant. The number of letters he receives, about it is prodigious; and the flood still comes in as if none had flowed before—the great west goes for him with a rush.'"

See *Life and Letters of George Ticknor*, Vol. II.



- would take any high moral ground on this Slavery question.
- March 10. Sumner at dinner. He feels sadly about Webster's speech. But I say, Let us have it all and re-read it before judging.
- March 16. In town. Talked with Mr. Samuel Appleton about Webster. He says "I think it a most abominable Speech", and so do I.

In September, 1850, came the passage by Congress of the Missouri Compromise and the Fugitive Slave Acts, the news of which was received in Massachusetts by the firing of a national salute of one hundred guns on Boston Common, "as a testimonial of joy on the part of the citizens." A "Constitutional Meeting" was held in Fanueil Hall, addressed by Benjamin R. Curtis and Rufus Choate; and the Compromise was approved in a public letter addressed to Webster, signed by merchants, like Eliot, Perkins, Fearing, Appleton, Haven, Amory, Sturgis, Thayer, Hooper; by lawyers like Choate, Lunt, B. R. Curtis, G. T. Curtis; by doctors like Jackson, Bigelow; scholars like Ticknor, Everett, Sparks, Holmes, Felton; by divines like Moses Stuart and Leonard Woods; by lawyers like Franklin Dexter and Charles G. Loring. In the Law School, both Professors Parker and Parsons favored the Acts, and delivered lectures to the students in defence of them. (1)

On the other hand, Longfellow wrote September 15, 1850: "The day has been blackened to me by reading of the passage of the Fugitive Slave Law in the House, Eliot of Boston voting for it"; and Ralph Waldo Emerson said in a speech at Concord, May 2, 1851: "The act of Congress of Sept. 18, 1850, is a law which every one of you will break on the earliest occasion . . . a law which no man can obey or abet the obeying without loss of self respect and for failure of the name of gentlemen."

James Russell Lowell wrote:

Nov., 1850: I have been hoping to write something in verse about the horrible slave bill, something in Hosea Bigelow vein, with a refrain to it that would take hold of the popular ear (long enough to be easily taken hold of, you will say). I should like to tack something to Mr. Webster (the most meanly and foolishly treacherous man I ever heard of), like the tail I furnished to Mr. John P. Robinson.

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(1) See *Memoirs and Letters of Charles Sumner*, by Edward L. Pierce, Vol. III.

Such were the sentiments of the opponents of the Fugitive Slave Law; and they were publicly expressed on all occasions—notably at meetings held in Faneuil Hall, in October and December, 1850, in speeches made by Wendell Phillips, Theodore Parker, C. F. Adams, Frederick Douglass and Charles Sumner. The abolitionists of the Garrison type were even more anarchical in their expressions.

In the fall of 1850, a small band of law students, not more than half a dozen out of the entire School, joined the Free Soil party, and campaigned through the State with Sumner, Dana, Henry Wilson, J. G. Palfrey and Anson Burlingame, (L. S. 1844-46). Prominent among them were Edward L. Pierce of Dorchester, Mass. (L. S. 1850-52), and John Winslow (L. S. 1850-52), later a distinguished lawyer of Brooklyn, N. Y.

Turning aside from politics, it may be noted that the years 1849-50 were of special interest to the law students, by reason of four noted law cases in which Harvard Professors took a prominent part. The first was the famous Edward Phillips will case in 1849, in which Rufus Choate, Benjamin R. Curtis and Otis S. Lord prevailed against Joel Parker, Sidney Bartlett, and William H. Gardiner.<sup>(1)</sup> The second was a case which created much popular feeling, involving the question of the exclusion of colored children from the white schools of Boston—*Roberts v. Boston*, (5 Cush. 206)—argued by Charles Sumner and Robert Morris, a young negro lawyer, for the negroes, against Peleg W. Chandler.

The third case was that of the *Boston and Lowell R. R. v. Salem and Lowell R. R.* (5 Cush. 375), in 1850, involving the question whether the plaintiff had an exclusive right to a railroad between Boston and Lowell. It was one of the most noted cases argued by Joel Parker, Elias Haskett Derby being his associate, and Charles G. Loring and Benjamin R. Curtis his opponents,

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(1) An interesting letter from Everett to Chief Justice Shaw Aug. 29, 1848, (*Harv. Coll. Archives. Letters of the President*), states that Professor Parker had been asked to take part in the case, but desired first to know whether the College would object. Under the will a legacy was made to the College. The heirs, seeking to break the will, would agree however to pay the legacy. Everett continues:

"As Loring and Curtis are retained by the executor, would it not be good policy to let Judge Parker act for the heirs? It appears to me our duty and our interest to abstain from anything which would tend to change their present favorable disposition towards it. To refuse to permit our Professor to advise them might have that tendency."

both of the latter being members of the Corporation of Harvard College, Parker winning on demurrer.(1)

Harvard College was stirred to its depths in March, 1850, by the noted trial of Professor John W. Webster for the murder of Dr. George Parkman, who had disappeared in November, 1849, and parts of whose dissected body had been found in a vault of the old Harvard Medical School building, a month later.(2)

Many of the law students had been enthusiastic attendants at Professor Webster's popular lectures on Chemistry; many knew him as a personal friend. On the days of the trial before the Supreme Court in Boston, the Law School lectures were suspended; and admittance to the court room was given to the law students by tickets specially issued to them. The case was heard by Chief Justice Shaw and Judges Samuel S. Wilde, Dewey and Theron Metcalf. For the Government there appeared Attorney General John H. Clifford and George Bemis (later founder of the Professorship of International Law in the Law School). For the defendant appeared Pliny Merrick (later Judge of the Massachusetts Supreme Court) and Edward D. Sohier. Both Daniel Webster and Rufus Choate had been asked to become counsel for Professor Webster, Franklin Dexter and Charles Sumner being particularly urgent that Choate should take the case "in the interest of humanity." Choate, however, declined to act as counsel unless the defence should be that of self-defence or manslaughter.(3)

In a review of the case in the *North American Review* in 1851, it was said(4):

The trial in the course of its progress was a cause of intense excitement extending through the whole length and breadth of the land, and reaching even into foreign countries.

To the honor of the community, be it said, that the excitement, however prolonged and intense, was tempered by a due regard for the majesty of the law and the purity of its administration. However deep the feeling, no popular outbreak threatened to wrest

(1) This case was finally decided in 1854, (see 2 Gray 1) with a notable array of eminent counsel taking part, Rufus Choate, Charles G. Loring and Josiah G. Abbott for the plaintiff; and Joel Parker, Stephen H. Phillips and George Minot for the defendant; Parker losing his case.

(2) *Com. v. Webster*, 5 Cush. 295.

(3) See *Life of Rufus Choate*, by Samuel G. Brown.

*My Own Story*, by John B. Trowbridge.

(4) Review of Bemis' Report of the Webster trial in *North American Review*, Vol. LXXII.

the prisoner, guilty as he was deemed, from the hands of the officers of justice.

#### THE FUGITIVE SLAVE CASES.

In 1851, there arose in Massachusetts the first of that series of Fugitive Slave cases, which did more than anything else to consolidate the various shades of anti-slavery sentiment.

On February 14, Shadrach, alias Frederick Jenkins, an alleged slave, was arrested in Boston and taken before the United States Commissioner George Ticknor Curtis (L. S. 1833-34), brother of Benjamin R. Curtis, who was then sitting in the United States court room in the old Court House in Court Square. Richard H. Dana, Jr., whose office was opposite the Court House at 30 Court Street, was at once retained as counsel for the slave, with Robert Morris, a young attorney (who had been admitted to the Bar in 1847, after studying in the office of Charles G. Loring and who was the first colored lawyer at the Suffolk Bar). Sumner declined to act as counsel, being a candidate in the senatorial election then pending in the Legislature. An attempt to obtain from Chief Justice Shaw a writ of habeas corpus was unsuccessful. Pending an adjournment of the case, however, a band of negroes and abolitionist sympathizers made a raid on the court house, swept through it, taking the fugitive along with them, and, as has been said, "leaving the indignant Commissioner to telegraph to Mr. Webster in Washington that he thought it was a case of levying war".<sup>(1)</sup> Shadrach was secretly taken out of the City and finally out of the State—"the most noble deed done in Boston since the destruction of the Tea in 1773", said Theodore Parker; and Longfellow noted in his diary:

Feb. 15, 1851. Hear that a fugitive slave, or a man accused of being one, escaped to-day from the court room during the recess, aided by other blacks (Shadrack a hotel waiter). Very glad of it. This government must not pass laws that outrage the sense of right in the community.

Robert C. Winthrop uttered the Whig view in writing, Feb. 17, 1851: "You see there has been a rumpus and a riot in Boston, and escape from the Marshall. . . . It is lamentable to have such a triumph given to nullification and rebellion."<sup>(2)</sup>

(1) *Autobiography of Seventy Years*, by George F. Hoar, Vol. I.

(2) *Life of Robert C. Winthrop*, by R. C. Winthrop, Jr.

On June 1, 1851, the trials of James Scott, Lewis Hayden, John P. Coburn, Thomas P. Smith, Joseph K. Hayes, Robert Morris and Elizur Wright, implicated in the rescue of Shadrach, began before Judge Peleg Sprague in the United States District Court. (1) John P. Hale and Richard H. Dana, Jr., appeared for the defendants, George Lunt being United States District Attorney. The trial of these "Rescue Cases" lasted for eighteen months; but no convictions were secured. (2) In one case, the jury stood eleven to one against the defendant, and as Dana discovered afterwards from the man himself, the one jurymen who stood out was the very man who had carried Shadrach out of the State. George F. Hoar tells the story as follows (3):

I went into the court room during the trial of Elizur Wright, Editor of the *Chronotype*, indicted for aiding in rescue of Shadrach and saw seated in the front row of the jury my old friend Francis Bigelow. . . . He was a Free Soiler and his wife a Garrison Abolitionist. His house was a station on the underground railroad where fugitive slaves were harbored on their way to Canada. Shadrach had been put into a buggy—driven out as far as Concord and kept over night by Bigelow at his house. . . . Richard H. Dana, who was counsel for Elizur Wright, asked Judge Hoar what sort of a man Bigelow was. To which the Judge replied. "He is a thoroughly honest man and will decide the case according to the law and evidence as he believes them to be. But I think it will take a good deal of evidence to convince him that one man owns another."

Before the excitement of the Shadrach case had begun to abate, Boston was again upheaved by the arrest of another alleged fugitive slave—Thomas Sims, April 3, 1851. (4) Sims was arrested at the instance of Seth G. Thomas, counsel for the slave-owner, on a warrant issued by United States Commissioner George T. Curtis, who placed Sims in the custody of the United States Marshal, Charles Devens (L. S. 1838-40). Samuel E. Sewall,

(1) See interesting account in *Richard H. Dana* by Charles Francis Adams, Vol. I; also *Pen Portraits*, by "Warrington" (William S. Robinson) (1877).

(2) Benjamin R. Curtis (L. S. 1820-30) who succeeded Story's successor, Levi Woodbury, in the United States Supreme Court, in October, 1851, presided at these trials.

(3) *Autobiography of Seventy Years*, by George F. Hoar, Vol. I.

(4) For full and accurate contemporary account of the case, see *Law Reporter*, Vol. XIV, (May, 1851).

See also especially, *Richard H. Dana*, by Charles Francis Adams; *Memoirs and Letters of Charles Sumner*, by Edward L. Pierce, Vol. II; and *Memoirs of Robert Rantoul, Jr.*, by Luther Hamilton (1854).

Richard H. Dana, Jr., Charles Sumner, Charles G. Loring and Robert Rantoul, Jr., acted as counsel for Sims. On April 4, a petition for habeas corpus was argued in the State Supreme Court before Chief Justice Shaw, who decided against the petition, upholding the constitutionality of the Fugitive Slave Law(1). On April 11, Mr. Curtis remanded the slave to the custody of his owner.

Meanwhile over half a dozen applications for various legal processes were made to District Judge Peleg Sprague and Supreme Court Judge Levi Woodbury, to obtain Sims' release, or his surrender to the State authorities—but without success. From April 4 to April 12, Sims was confined in the Court House and the sidewalks around the building were enclosed by chains and guarded by a strong force of police, in fear of a popular uprising; and it was said that Judge Shaw actually went under the chains to get to his court room.

"I never had any confidence in the Supreme Court of Massachusetts in case the Fugitive Slave Law came before it," wrote Theodore Parker to Charles Sumner, "But think of old stiff necked Lemuel visibly going, under the chains. That was a spectacle!"(2)

On the day of the arrest, Wendell Phillips made an incendiary speech to a large gathering on the Common, and that evening

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(1) *Sims Case*, 7 Cush. 285.

(2) Letters of Theodore Parker, April 19, 1851, in *Life of Theodore Parker*, by O. B. Frothingham (1886).

See also Letter of "Warrington" to *Lowell-American* in *Pen Portraits*, by W. S. Robinson, April 14, 1857.

"Who has done this? Not Massachusetts? No. The humiliation belongs to Massachusetts; but the infamy belongs to Boston alone. The chained court-house, the military array, the extraordinary police-force by night and day,—these things show that it was only with great difficulty that even in Boston the law could be enforced; nowhere else in the State would there have been the least prospect of success. It is only in the midst of a corrupt public sentiment that such an infamous law can be enforced; and the country is sound to the core on this question.

Perhaps it is too sweeping to say that Boston is responsible for this. It is a combination of the money and the Websterism of Boston which is responsible,—the corrupting political influence of the most corrupt politician that ever cursed the country with his presence, combined with the base love of gain, which would sacrifice all law, and all conscience, and all liberty, for the profits of slaveholding trade. It is the fifteen hundred 'respectable men,' who, according to Tukey, volunteered to aid in carrying Sims back to Slavery, who have done this. Their money corrupted the pulpit and the press; their political influence controlled the city authorities, and placed the laws of the State at defiance, that John B. Bacon might carry off his 'nigger.' Oh, what a triumph of Webster-Whiggery! What a victory of cotton over the conscience of the people!"

Theodore Parker addressed a meeting in Tremont Temple. Five days later, an excited convention met in Tremont Temple, presided over by Horace Mann, and addressed by Henry Wilson, Thomas W. Higginson, William Lloyd Garrison and John G. Palfrey. On April 12, however, Sims was removed from Boston by his owner.(2)

The sentiments of the anti-slavery men are interestingly shown in the following diary entries.

James Russell Lowell wrote:

April 20, 1851. I agonized to write something about the kidnapping of Sims—but the affair was so atrocious that I could not do it.

Richard H. Dana, Jr., wrote:

Our temple of justice is a slave pen! Our officers are slave hunters, and the voice of the old law of the State is hushed and awed into silence before this fearful slave power which has got such entire control of the Union.

Longfellow wrote:

- April 4, 1851. There is much excitement in Boston about the capture of an alleged fugitive slave. O city without soul! When and where will this end? Shame that the great Republic, the "refuge of the oppressed", should stoop so low as to become the Hunter of Slaves.
- April 5. Troops under arm in Boston; the court house guarded; the Chief Justice of the Supreme Court forced to stoop under chains to enter the temple of Justice! This is the last point of degradation. Alas for the people who cannot feel an insult! While the "great Webster" comes North to see that the work is done!
- April 6. Sumner says that Charles G. Loring is to defend the fugitive Sims. They want to get a chance to argue the Constitutionality of this Fugitive Slave Law.
- April 12. Dined in town; had some political chat with S. A. Good old man! who is true to his pure and upright instincts and holds the Fugitive Slave Law in proper detestation.
- April 25. The papers are all ringing with Sumner, Sumner! and the guns are thundering out their triumph. Meanwhile the hero of the Strife is sitting quietly here, more saddened than exalted. Palfrey dined with us. I went to my Don Quixote at college, leaving the two Free Soilers sitting over their nuts and wine.(1)

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(1) The reference here was to Sumner's election as United States Senator. At the fall election of 1850, no Governor was chosen by the people; but at the next session of the Legislature George A. Boutwell

The views of the conservative Whigs of Boston are illustrated by the following letter from Webster to President Fillmore, April 13, 1851(1):

You will have heard that the negro Simms left Boston yesterday morning. On this occasion, all Boston people are said to have behaved well. Nothing ever exceeded the malignity with which abolitionists and free soilers persecute all those who endeavor to have the laws executed. They are insane, but it is an angry and vindictive insanity. Fortunately the number is not large. They made every possible effort to protect themselves under some show of legal proceedings, but all their efforts failed. Every Judge decided against them, and their judicial opinions taken together made a strong exhibition of legal authority. There are Judge Sprague's charge, Mr. Curtis' opinion, and an admirable judgment in the Supreme Court of Massachusetts, not yet reported in full, and Judge Woodbury's opinion. At the same time also came out Judge Nelson's charge. I cannot but think that these judgments will settle the question with all sane men in Massachusetts. Now we need one thing further viz.: the conviction and punishment of some of the rescuers. After that shall have taken place, it will be no more difficult to arrest a fugitive slave in Boston than to arrest any other person.

#### THE STORY ASSOCIATION.

The intimate connection between the politics of the times and the Law School affairs is well illustrated by the episode of the Story Association.

In the Report to the Overseers of the Visiting Committee made in November, 1849, written by Charles Sumner, attention was called to the fact that as yet no adequate memorial to Judge Story had been created in the School:

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was elected Governor, by a coalition of Democrats and Free Soilers. Henry Wilson, Free Soiler, was made President of the State Senate, Nathaniel P. Banks, Democrat, Speaker of the House. After a contest lasting from Jan. 14 to April 24 Sumner was elected over Robert C. Winthrop to fill the vacancy caused by Webster's resignation, to serve from March 2, 1852. Robert Rantoul was elected to fill the unexpired term up to that time. The feeling of the conservative section of the Whig party is voiced in a letter of R. C. Winthrop Jan. 12, 1851.

"If I had the privilege of naming a Free Soil successor, it would be Samuel Hoar, who is the most respectable man of his party. Morton or Mills too, I could cheerfully make way for. Even S. C. Phillips or Mann would not nauseate me. But I confess my stomach revolts from Sumner."

See *Life of Robert C. Winthrop*, by R. C. Winthrop Jr.

(1) *Writings, Letters and Speeches of Daniel Webster*, Vol. XVI (1903).



In reviewing the history of the School, the Committee, while remembering with grateful regard all its instructors, pause with veneration before the long and important labors of Story. In the meridian of his fame as a judge, he became a practical teacher of jurisprudence, and lent to the University the lustre of his name. The Dane Professorship, through him, has acquired a renown which places it on the same elevation with the Vinerian Professorship at Oxford, to which we are indebted for the Commentaries of Sir William Blackstone. These "twin stars" shine each in different hemispheres, but with rival glories.

Sumner, for the Visiting Committee, in his Report of Nov. 15, 1850, again urged that:

It feels that it ought not to omit the opportunity of again calling attention to a duty of the University still neglected towards one of the most eminent professors and largest pecuniary benefactors in its history.

Only a few days before his decease in conversation with the undersigned, the eminent person in question said: "To you after my death I look to place my service to the Law School in their proper light before the public". This was attempted in the report of last year and the report is now renewed.

The Committee suggested a memorial in the shape of either a building, a fund, or a professorship.

James T. Austin, for the Visiting Committee, Jan. 22, 1852, reported: "The committee regret that its late eminent Professor has not yet been honored by some special mark of public regard alike demanded by his talents, his services, and his pains." (1)

While no action was taken by the College authorities, a movement was started among the law students to perpetuate Story's name.

George Gorham Williams, son of Samuel K. Williams of Boston, a Harvard graduate of 1848 and a member of the senior class in the Law School in 1850, a young man of wealth, social position, of great mental and physical vigor, and hearty enthusiasm, conceived the idea of an Association, to be formed by the students and graduates of the School. As he was one of the leaders among the students, and one of the prize essayists, his efforts met with instant success; and the "Story Association" was organized in 1850, with Hon. William Kent as President, and Williams himself as Secretary, the object, as expressed, being

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(1) It is a singular fact, however, that nothing was ever done by the Corporation until the founding of the Story Professorship in 1875.

for the purposes of raising the standard of the legal profession, of uniting its widely scattered members, of diffusing among them an elevated feeling of nationality, of presenting the Law College to the public as an institution devoid of all party and sectional feelings and prejudices, and of reviving the pleasing memories of legal study.

The graduates of the School took an active interest in the Association and joined in large numbers.

It was greeted with favor by the College authorities and the President in his Annual Report stated: "It is believed that this Association will have a beneficial effect upon the School, as well as form an additional bond of fellowship among the students."

Its scope and purpose was officially set forth in the Law School Catalogue for the academic year 1852-53, (issued in the fall of 1852):

In the year 1850, the Dane Law School had from a small beginning become so large and important an institution that many of its alumni and friends felt that an annual meeting of its numerous pupils would be at once pleasing and beneficial; they therefore organized an association to consist of the former and immediate members of the Dane Law School, and of such gentlemen of distinction in the legal profession as they may from time to time elect into their ranks.

They have given to the association the name of the venerated Story, a name for many years intimately connected with the welfare of the School and respected by all engaged in the practice and study of the law.

It is the intention of the Association to have an annual celebration on the day before the College Commencement, to listen to an oration from one of its most eminent members and to dine together in Dane Hall.

As the Alumni of the Law School are scattered over the whole country it is believed that the occasion which annually reunites them will have more than a local or sectional interest. That which in any degree promotes the frequent intercourse of the members of the profession throughout the country must increase among them the feeling of mutual regard; and it is not unreasonable to hope that the higher object may be attained of giving a degree of uniformity and system to the changes which legislation is making in Common Law.

In June, 1851, it was decided to celebrate the first anniversary with an oration and dinner, and Rufus Choate, then at the height

of his fame, accepted the Association's invitation to be orator of the day. (1)

Shortly before the date fixed—July 15, 1851—and only two months after the popular excitement over the Sims case, it became noised about that Choate would endeavor, in his oration, to inculcate his views of the proper course to be pursued by young men relative to the Fugitive Slave Law, and was to defend the Law (2). Charles Sumner wrote at once to the Association declining to attend.

The meeting was a brilliant success. The Association and its guests gathered at Dane Hall, and at noon walked in procession, headed by a band, to the First Church. After music, and a prayer by Dr. Walker, Choate delivered his oration, which lasted until two o'clock. A dinner followed, at which President Kent presided. Choate spoke to the toast of *The Graduating Class*. Chief Justice Shaw replying for *The Judiciary of Massachusetts*, referred to the School as teaching national rather than local law. Judge Samuel Sumner Wilde, of Massachusetts, responded to *The Science of Law*; Sidney Bartlett, to *The Bar of Massachusetts*.

Judge Kent in introducing Professor Parker, said, "that a most dreadful pun had been placed in his hands which he would make worse in giving; but he would propose the health of the Professors of the Law School and address them in the words of Hamlet to the ghost—'I call thee father—Royall—Dane'." (3)

Professor Parker spoke on *The Law School*; Professor Parsons, on *Story*; William Wetmore Story, on *The Association*; and Charles G. Loring, on *The Litchfield Law School*. One of the law students, J. W. A. Sanford of Milledgeville, Georgia, responded to a call from the students in a neat speech. Other speakers were Judge Edmunds, of the New York Supreme Court,

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(1) The originator of the Association, George G. Williams, did not live to see the fruit of his efforts for he died suddenly June 25, 1851.

See notice in *Law Reporter*, Vol. XIV.

(2) How conservative and impracticable Choate's views on the slavery question at this time were, may be seen from his speech at the Whig convention held in Baltimore a year later, July 16, 1852, when he urged that the party declare that "in its judgment the further agitation of the subject of Slavery be excluded from and forbidden in national politics . . . that the Federal Government close its labors and retire, leaving it to the firmness of a permanent judiciary to execute what the Legislature has ordained. Why should we not engage ourselves to the finality of the entire series of compromises."

(3) *Boston Daily Advertiser*, July 21, 1851.

Gen. Carpenter of Rhode Island, who spoke on the talent shown in the prize essays; E. Fitch Smith of New York; Chief Justice Eustis of Louisiana; and Richard H. Dana, Jr. Letters of regret were read from Ex-Professor Greenleaf, Edward Everett, and Charles Sumner.

The student committee of arrangements was Sidney Bartlett, Jr., of Boston, Richard T. Gittings of Maryland, Washington Murray of New York, Alfred Russell of New Hampshire, and George R. Loch of Kentucky.

The *Law Reporter*, describing the occasion, said(1) :

The Hon. Rufus Choate was the orator of the day. He "proposed to speak particularly of a single one of the new duties which devolve on students of law in view of the present state of affairs, namely, to extend their thoughts and studies somewhat to the ethical grounds on which the national system of the Republic is founded; to defend the Constitution and law of the country on the principles of a sound and elevated morality; to guide and enlighten the general conscience in the theory and practice of all the civil duties." His address was certainly brilliant, able, and eloquent, and above all the other merits was its earnest and patriotic tone. It was listened to attentively by a full audience and frequently applauded with hearty enthusiasm. After the oration a neat ode written for the occasion by Hon. George Lunt was sung. At the conclusion of the literary exercises, the members of the Society and their guests partook of a dinner in the Law Library. Judge Kent, President of the Association, presided, and many pleasant and profitable speeches were made.

From the above account, no one would suppose that this celebration had aroused the bitterest of political feeling, or that the Story Association had been turned from a professional into a partisan gathering.

But the anti-slavery men of the day were in such a supersensitive condition that they could brook no reference that might be construed as even remotely adverse to their cause, and they resented the attacks they professed to find in the speeches. Choate's oration and some of the remarks made at the dinner were at once made the subjects of denunciation. While it is true that the oration contained no mention of Story, the political criticism directed at it was in reality unjustifiable. It was a noble and dignified appeal to young men, and its references to the political situation were not such as would have offended or disturbed anyone in or-

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(1) *Law Reporter*, Vol. XIV (1851).

dinary times. Nevertheless the *Commonwealth*, a bitter anti-slavery newspaper, contained the following outbreak in its issue of July 17, 1851:

We gave yesterday a sketch of the celebration of the Story Association. Since that time facts have come to our knowledge relating to this occasion, which seems to have been for the most part managed by hands that "knew not" Story, or at all to have sympathized in his ardent love for the progress and triumph of Liberty.

The celebration turned out to be little else than a hunker, pro-slavery speech-making occasion, or rather there was a conspiracy to make it such, the success of which was somewhat equivocal. Mr. Choate's address was, as we have before described it, a rhapsodical speech in favor of the Fugitive Slave Bill and against the Free Soil principles and men. It was in the flower of his most fallacious and sarcastic manner and was an insult to every man of Free Soil principles who was present. It became known on the day before that this would be the case, and some of the distinguished and attached friends of the Law School and of Judge Story staid away on that account. After the exercises, came the dinner. Here again the speeches savored occasionally of the oration. Although from such men as Judges Shaw and Wilde and Charles G. Loring, nothing came or was likely to come that was not pertinent, yet there was no equal actual offence until the speech of Gen. Carpenter of R. I., who in a tone the most emphatic and insolent, denounced the Free Soil Party, "as a miserable, conceited, fanatical faction", and alluded triumphantly to the handsome punishment they had received from the orator of the day.

Richard H. Dana, Jr., in his diary gives this interesting view of the occasion:

July 15. This day was the anniversary of the Story Association. Choate delivered the oration. It was generally understood the afternoon before that he was preparing something on the Fugitive Slave Law and against the Free Soil party. Sumner told me so and would not go. I begged him to go to the dinner, and told him that if anything was said against us he would make fight. But he declined.

As I went up the platform, Choate shook hands, and said, "I am sorry you are coming. I shall have to offend you. You had better reconsider." And sure enough, the oration was a defence of the administration policy as to slavery, and an attack on the Free Soil party and principle. The plan was to prove that the preservation of the Union, in the scale of an enlightened morality, was a greater and a higher virtue than that which refused to

surrender a fugitive slave, assuming of course, that the two could not coexist. It was an improper and inappropriate thing, and I think generally felt to be so. This was an occasion when all party questions were to be excluded and the graduates of the School to meet as brothers on common ground, to be addressed on some subject of common interest. President Quincy and Mr. Hoar were the two oldest men present, both Free Soilers, and a striking commentary on the contemptuous manner in which Choate spoke of the youthful enthusiasm and inexperience of the Free Soil party. Neither of these gentlemen attended the dinner.

At the dinner there was nothing offensive, except the speech of General Carpenter of Rhode Island, who spoke of "that miserable, conceited, fanatical, faction," etc. In my remarks I alluded to this in a pleasant way, but so that they should feel it. Mr. Story, in returning thanks for his father's memory, spoke of introducing "a regard for liberty in law, and conscience into legislation." Judge Hoar's toast was also to the point, about love of liberty, reverence for law and fear of God. On the whole, they had the disgrace of making an ill-mannered attack, and we rather had the last word.

July 17. Phi Beta. . . . At the dinner President Quincy was first called up, and received, all standing. He pronounced a feeling eulogy on Judge Story as the real founder of the Law School, and concluded by saying that he had been forced into this by an occurrence of a recent date—that he had attended the exercises of the Story Association, and with deep regret heard an oration of which he would say nothing except that it had not one word about Joseph Story, or the Law School, or Mr. Dane.

Mr. Story in replying gave "Josiah Quincy, always true to liberty, virtue and friendship."

While the memory of their past Professor was thus being kept alive by the law students, their high regard for the present Professors was not wanting. After five years service, both Parker and Parsons had acquired great popularity with their pupils. The characteristics of the two men were as widely different as could possibly be; but the influence of both was great, not only as teachers but as men. This was now shown by the pleasant compliment paid to them when, in 1852, their pupils requested them to allow their portraits to be painted, for presentation to the Corporation by the law students.<sup>(1)</sup> These portraits were accepted with thanks by the Corporation, December 21, 1852, and were hung in Dane Hall. They are now on the walls of Austin Hall.

An effort was made by the Story Association, May 28, 1853, to

(1) See letter dated December 21, 1852, from Charles C. Grafton (L. S. 1851-54) representing a committee of students presenting a por-

have the marble bust of Story, then in the College Library, removed to the Dane Hall Lecture Room, on the ground that the "only portrait there is by Page of the kit cat size, and a plaster cast. The portrait is thrown in the shade by the full length pictures of George Washington and Mr. Webster, which hang on either side of it." (1) This request, however, the Corporation refused.

After this, the Story Association seems to have dropped out of existence and out of memory. (2) Its life had been somewhat ineffectual, for it had never recovered from its baptism of politics; and the Choate dinner so tinged its after-history that Sumner and others declined to deliver the oration in 1852. The only official reference to the Association in the College Records is the previously quoted announcement in the College Catalogue of 1852-53, to which was appended a copy of its constitution and a list of officers, as follows:

Hon. James L. Petigru of South Carolina, President; Hon. John H. Clifford of Massachusetts, Hon. Timothy Walker of Ohio, Hon. Reverdy Johnson of Maryland, Vice-Presidents; Frederick H. Winston of Georgia, Corresponding Secretary; Thornton K. Lothrop of Massachusetts, Recording Secretary.

#### LANGDELL AND HIS FELLOW STUDENTS.

The years 1851, 1852 and 1853 were especially interesting both in the annals of the law and of the Law School.

Among the men in the School about this time, prominent in later days, were Melville W. Fuller (L. S. 1854-55), Dorman B. Eaton (L. S. 1849-50), William Crowninshield Endicott (L. S. 1849-50), Horace Davis (L. S. 1850-51), George M. Stearns (L. S. 1850-51), Asa French (L. S. 1851-53), Addison Brown (L. S. 1853-55), James C. Carter (L. S. 1851-53), John B. Felton (L. S. 1849-50, 1852-53); Nicholas St. John Green (L. S. 1851-53), William G. Choate (L. S. 1852-54), Joseph H. Choate (L. S. 1852-54), James B. Eustis (L. S. 1852-54), Sylvester Pennoyer

trait of Parsons by Joseph Ames. See also letters dated December 22, 1852, from Sidney Bartlett, Jr., (L. S. 1850-51), presenting portrait of Parker.

*Harv. Coll. Papers*, 2nd Series, Vol. XIX.

(1) See letter of Thornton K. Lathrop (L. S. 1851-53), transmitting petition of the Story Association to the Corporation—*Harv. Coll. Papers*, 2nd Series, Vol. XX.

(2) None of the law students of 1851-1865 to whom the author has written have been able to recall anything about the Association.

(L. S. 1853-54), Charles Doe (L. S. 1853-54), Charles C. Grafton (L. S. 1851-54), William E. Chandler (L. S. 1853-55), John D. Washburn (L. S. 1855-56), and George O. Shattuck (L. S. 1852-54).

Perhaps the most interesting of all the men, however, who entered the School in 1851 was a young student named Christopher Columbus Langdell. Langdell was born in New Boston, N. H., May 22, 1826. His lineage was Scotch-Irish, and Scottish traits were prominent throughout his career. His great grandfather, a farmer, had removed from Beverly, Mass., to New Hampshire, in 1771. Langdell attended for a short time an academy in Hancock, N. H. Determined to secure an adequate education, he earned money by working in the Manchester Mills in 1844. Aided by the indefatigable efforts of an older sister, he entered Exeter Academy in the spring of 1845. By means of money earned by working round the Academy buildings, and from a scholarship, he finished his course there.

In 1848, he entered Harvard College as a sophomore in the Class of 1851, and by the end of the year ranked second in the class. In December, 1849, however, from lack of funds he was obliged to leave College. After doing some manual labor and a little teaching, he began the study of law in the office of Stickney and Tuck, in Exeter, N. H.

He entered the Harvard Law School, November 6, 1851.

From the outset, both Professors and students recognized him as a man of unusual ability.(1)

On September 4, 1851, the Corporation adopted the following vote, recommended by Professors Parsons and Parker:

That each Professor of the Law School may nominate to this Board a student whose pecuniary situation may require aid and who shall be employed in services useful to him and shall be compensated therefor by a remission of a part or the whole of his tuition fees until further order by the Corporation.

The purpose of this vote was twofold, first, to assist students who were unable to remain in the School, second, to take some of the detailed work from the shoulders of the Professors. Under this vote, the Corporation, for many years, remitted the tuition fees of from two to four students each year; and the first remis-

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(1) See *Professor Langdell—His Student Life*, by Jeremiah Smith, *Harv. Law Rev.*, Vol. XX.



sion was made December 27, 1851, on the suggestion of Professor Parker, to Langdell. (1)

In 1852, he was made Librarian, which position he retained three years (1852-54). He was a member of the Coke Law Club, one of the two most popular and distinguished Clubs.

It is interesting to note that in 1852 he argued three cases before the Moot Courts, losing all three. (2) The first case (one of fraudulent representation) was argued by him, in Moot Court, January 6, 1852, with George H. Wood, against John Ordronaux and Adna B. Underwood. Langdell submitted a very elaborate brief citing *Cro. Jac., Yelverton, Rolle Abr. Price, Holt N. P.* Judge Parker decided against him. The second case (one of a lapsed devise) was argued by him with Charles L. Flint, against John D. Taylor and John B. D. Cogswell, April 15, 1852, before Professor Parsons. The third case (one of warranty on sale by sample) was argued by him against Frederick H. Winston, June 4, 1852, before Judge Loring.

Parsons, who at this time was writing his famous work on *Contracts*, recognized Langdell's remarkable powers as a student of the law and employed him very largely in writing the notes and collecting the material for his book. Co-laborers with Langdell in this work of assisting Professor Parsons were William E. Chandler (L. S. 1853-55), later Senator from New Hampshire, and John Lathrop (L. S. 1853-55) later Judge of the Massachu-

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(1) See letter of Parker to the Corporation, Dec. 15, 1851, *Harv. Coll. Papers*, 2nd Series, Vol. XVIII.

"I have the honor to nominate to the Board Mr. Christopher Columbus Langdell of New Boston, N. H., as a person well entitled to the benefit of the vote of the Corporation passed September 4, 1851. He has come to us well recommended and is desirous of availing himself of the advantages of the Law School; but his pecuniary circumstances are such that he cannot well do so without a remission of the fees for tuition."

Three years later, Sept. 20, 1854, the Professors recommended (See *Harv. Coll. Papers*, 2nd Series, Vol. XXI) that the Law Faculty be allowed to make special agreements with limited number of needy students, say six each term, to take their personal obligation for tuition, with the understanding that payment is to be made whenever students shall be of sufficient ability. "Each year many applications from students who would come if they could get employment."

The Corporation voted March 31, 1855, as follows:

"Voted that the Law Faculty be authorized to allow credit for tuition fees either wholly or in part to students in the Law School not exceeding six at one time, for such time and on such terms as they shall deem expedient."

(2) See Moot Court Book (March 13, 1851 to June 22, 1852) owned by Charles R. Codman (L. S. 1851-52), and loaned to the author (1907).

setts Supreme Court. Judge R. M. Benjamin (L. S. 1854-55) writing to the author (1908) says:

Parsons had a room at the right of the hall leading to the Library in Dane Hall, and every morning on a long table in his room could be seen a number of law reports with place marks. It was understood that these reports had been collected for him from digests and indexes by C. C. Langdell, who was then the Law Librarian. From these reports Prof. Parsons prepared the text of his work and selected the cases for his notes.

Among Langdell's successors in collaborating with Parsons on the latter's *Mercantile Law* (published in 1856) and *Maritime Law* (published in 1859) were Robert R. Bishop (L. S. 1856-57), now judge of the Superior Court in Massachusetts, Daniel W. Wilder (L. S. 1857-58) and several others who have later achieved distinction in the profession. One of these associates has written to the author:

The copy left on me this impression,—a brief margin of text by Parsons, clearly and neatly written at the head; then three or four times the space in text and citations in the inky, strong hand of Langdell—a name then first heard by me. It appeared to me mainly the work of Langdell.

Hon. Joseph H. Choate (L. S. 1852-54) writes (1907):

Professor Langdell was at that time the Librarian and was assisting Mr. Parsons in getting out the notes of his work on *Contracts*, of which I have often thought that the notes were the most valuable part. He was a tremendous student, following the system of studying the cases and not caring much about text books. . . . He was looked upon in the Law School as a prodigy of learning and master of research.

Right Rev. Charles C. Grafton (L. S. 1851-54) writes (1907):

Langdell had stood high in the undergraduate department, but had not means to carry him through. He came down to Cambridge with only \$20 in his pocket.

Shattuck gave him a couch to sleep on in his own room, and the small amount he had lasted him for nearly a term in providing his meals; but when he came to be Librarian, though the stipend was small he became comfortable. We students had a great admiration for his marvellous diligence and legal acumen. When one of the Professors had decided a moot case differently from the opinion Langdell had given, we who were his special friends always contended he was in the right, which he most modestly refused to accept.

He was very kind to me and we became intimate. When he was editing Professor Parsons' book on *Contracts*, he gave me a portion of it to do. The Professor's method was to give out certain portions of his book to some of the students, who, when they had completed their works, passed it over to Langdell for correction and revision. I remember I spent six months studying all the cases on the sixth section of the statute of frauds. When I brought my heap of work to Langdell, he was kind enough to commend it in part, but gave me a piece of advice which I have found profitable through life. I had pursued my legal speculations far and wide, and Langdell said to me, "Grafton, keep on the broad highway. You might spend a lifetime trying to solve legal questions in suppositious cases, and then practice a lifetime, and not one of them would come up to you in practice." He used to get me to read aloud with him evenings, along with Shattuck, for I had the small accomplishment of reading well. He taught us how, from his point of view, to study law. He began with the cases of leading import. We had to read them, and then state the points to him. He made us read all the leading authorities on such cases, and so he pounded certain principles of law into us. It was from this that he developed subsequently his book on "Cases".

Through his kindness to me, I was elected, though one of the youngest, into the Coke Club. I think I pleased him by the defense I made when on the wrong side of a case. In the Club, when I joined it were the two Choates—the late ambassador, his brother, subsequently the Judge, James C. Carter, Langdell, Chandler, who was afterwards Senator, Shattuck, who became a distinguished lawyer in Boston, and I think, Hurlburt.

Langdell used to shut himself in the library on Sundays, and read all day.

Another of Langdell's contemporaries tells of finding him one day in an alcove in the Dane Hall Library absorbed in a black letter folio, and of Langdell's looking up and exclaiming "Oh, if I only could have lived in the time of the Plantagenets."

Though he roomed in Divinity Hall, he was so constantly and so late at night in the Law Library, that students used to say that he slept on the library table.

And it has been well said of him that: "He browsed among the reports as a hungry colt browses among the clover. The year books in particular enthralled him."

In 1853, Langdell's services in the Library had proved so valuable, and his work had increased so greatly that on Parson's recommendation the Corporation voted, Dec. 23, 1853, that his tuition

fees should be remitted for the year.(1) At the end of the academic year, 1852-53, he received his degree of LL.B.; but he continued another year in the School as a graduate student, assistant to Professor Parsons and also as Librarian.

When he finally left in 1854, the College paid him the unusual honor of conferring upon him the honorary degree of A. M., this action being taken at the earnest solicitation of Professor Parsons, who wrote to President Walker, June 3, 1854, the following interesting letter(2) :

Allow me to present the name of Mr. Christopher Columbus Langdell as a candidate for the degree of Master of Arts at the approaching Commencement.

Of this gentleman's life and character before he came to the Law School you know as much as I do. He has been in the School between two and three years; most of the time he has held and now holds the office of Librarian. I believe all who are connected with the School will agree with me, that no one of our graduates, for some years certainly, surpasses him and few equal him. I have no hesitation in saying that for capacity, industry, acquisition, perfectly good conduct, and all the elements of merit which a candidate for this honor could present, I should consider him certainly the equal of any young man whom I know.

It may be remembered also, that he would now have had this honor in due course, and with a high rank of scholarship, if he had not been compelled to leave his class by extreme poverty; from which he has now rescued himself by his own exertions.

I would add that he has received propositions to go to New York and enter at once upon extensive business, and has them now under consideration. And if he could carry with him this degree it would be especially useful.

A vivid description of life at the School at this period is given by Hon. Charles E. Phelps (L. S. 1852-53), now Judge of the Supreme Bench of Baltimore City, Maryland, in a letter to the author(1908) :

I went from Princeton to Cambridge in 1852. Age 19. Although several years had passed since the death of Judge Story, there were traditions and anecdotes current which kept his memory green. The one which I most distinctly remember as illustrating his geniality and sense of humor was as follows: On a blustering winter morning, coming into the vestibule of the Law

(1) See letters of Parsons, Dec. 23, 1853, *Harv. Coll. Papers*, 2nd Series, Vol. XX.

(2) See *Harv. Coll. Papers*, 2nd Series, Vol. XXI.

School, and stamping the snow from his feet, he would say to the students, who gathered around him to help him off with his overcoat, "Well, gentlemen, I declare, this is one of those days when a man would rather *facit per alium* than *facit per se*."

In reading this, of course, the old English or Oxford pronunciation of Latin then prevalent will have to be followed. To attempt to apply the modern importation of the continental broad *a* and hard *c* would make strange work with the Judge's pun.

I remember another anecdote not strictly connected with the Law School, but which is characteristic of the old gentleman. He was very sociable and fond of making an evening call. Upon one of these occasions the story goes that at a late hour he took out his watch, and said:

"Bless my soul I had no idea it was so late, the time has passed so pleasantly."

The Judge had done all the talking himself.

Notwithstanding these amiable reminiscences, I found at Cambridge a distinct anti-Story reaction. Especially among the older students there was a marked disposition to discount his reputation. Criticism was mainly directed upon his published works.

There was no sympathy with his appreciation of the Roman Civil Law. Fault was found with his copious citations from the unknown works of foreign jurists. A little of *Domat*, a little of *Pothier*, judiciously cited, might perhaps have been tolerated, but when it came to padding the text with page after page of Latin copied from continental authors, whose names had never been heard of, the sturdy spirit of the Old English Common Law then dominant at Cambridge, revolted. They did not know anything about *Huberus*, *Bartolus*, and *Voet*, *Matthoeus*, and *Maevius*, and what was more, they did not want to know anything about them.

The library of the Law School was more completely equipped with the literature of the Roman Civil law than any other library in this country at that time. That of course was owing to Judge Story's influence. It would be safe to say, that not one of the works of these foreign jurists was read by any student in my time, and that very few of them were ever taken down from the shelf.

The system of instruction was crude. Each Professor had a curriculum of his own which he went through, and new students were expected to catch on at whatever point happened to be reached. One of the first text books put in my hands under this system was *Marshall on Marine Insurance*, a book now forgotten. The contents consisted largely of a citation of cases and I had great difficulty in coping with them at a time when I had not progressed far enough in elementary instruction to distinguish between covenant and assumption.

The Librarian was no less a personage than C. C. Langdell, a book worm, if ever there was one. He always wore over his eyes

a dark shade with a green lining. I don't remember ever seeing him without it.

There were about a dozen of us who took our hash together at a boarding house on Brighton Street, and of these Langdell was the presiding genius. At table, nothing was talked but shop. Cases were put and discussed, and I have sometimes thought that from these table discussions Langdell got the germ of the idea that he later developed into the case system of instruction which has made his name famous both here and abroad. As to his personality there was nothing impressive, certainly nothing to give the slightest promise of his future distinction. Although somewhat inclined to pedantry and not very broad-minded, he was gentle, modest and obliging, and everybody was fond of Langdell.(1)

As to the Professors, Judge Parker was the favorite of the older students, Professor Parsons of the younger. The latter was in my opinion the better teacher. He was then giving us his forthcoming work on *Contracts*, by instalments. His family and mine being connected by marriage, I was on a very sociable footing with him. Judge Parker was considered by the older students more learned and profound. His opinion as Chief Justice of New Hampshire, in the case of *Britton vs. Turner*, 6 N. H., was boasted as a consummate masterpiece of judicial reasoning. I have read this decision over recently, and must admit that it compares favorably with the best work of Shaw, Kent, Gibson or Ruffin. Although less distinguished than either of his colleagues, Professor, afterwards Judge Loring, was an interesting lecturer. I find in my note book an abstract of one of his lectures on "Wills". topic, "Insanity", which shows that Phrenology was still considered a science in the middle of the Nineteenth Century. . . .

As the summing up of the whole matter I will say that I derived more benefit and more inspiration from talks and walks with fellow students than from lectures and from books, although these were of course the indispensable foundation.

In May, 1852, the Law School students had the privilege of receiving a visit from Louis Kossuth, the Hungarian patriot who had landed in this country, the previous December.(2) Of this

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(1) In *C. C. Langdell*, by James Barr Ames, in *Great American Lawyers*, Judge Phelps is quoted as saying:

"Over our sausage and buckwheat or whatever it was, we talked shop, nothing but shop, discussed concrete cases, real or hypothetical, criticised or justified decisions, affirmed or reversed judgments. From these table talks I got more stimulus, more inspiration, in fact, more law, than from lectures of Judge Parker and Professor Parsons."

(2) Alexander Wilson (L. S. 1851-53) writes to the author (1907):

"Whenever it was known that Rufus Choate was engaged in the trial of an interesting case, many of the law students went into the city to hear him. I also had the pleasure of hearing Kossuth, Webster and

visit, Longfellow records in his diary an interesting account :

April 27, 1852. This is the day of Kossuth's reception in Boston. From the balcony of 39 Beacon Street we saw the procession and the great Magyar bowing to the crowd ; a handsome bearded Hungarian with a black plume in his hat and clad in black velvet.

May 4, 1852. College Exhibition ! At half past one, Kossuth came with Governor Boutwell. Felton and myself received them at the door and ushered them into the Chapel amid enthusiastic shouts. The English oration had begun. The subject was "Unsuccessful Great Men", very well handled and odd enough at the moment. The President (Sparks) presented Kossuth to the students, and the Magyar in his deep, sweet, pathetic voice said a few words, with great applause.

On October 24th, 1852, occurred the death of Daniel Webster—an event which produced a profound impression on the law students.

The opening words of one of the most notable addresses made on the subject—a lecture by Professor Parker on *Daniel Webster as a Jurist*, show the tribute paid by the School :

We deviate, today, from the ordinary discussions of this place, that we may pay a further tribute to the memory of one who but a short time since held a commanding position in our chosen profession,—one who, if not in such fulness of years as we desired to have witnessed, yet, after the lapse of the ordinary limit of human life, now "sleeps well" in the silent dormitory of the dead.

You have fitly desired to do such honor as you might to him, whom you have rightly regarded as one of those greater luminaries who have "ruled the days" of the law, and whose light is not extinguished by the Providence which has removed him beyond the horizon which limits our present vision.

Upon the occasion of his death, you shrouded our edifice in the emblems of that mourning which was not of mere outward show, but which pervaded your hearts. And you have now placed within the hall of our daily studies a striking portraiture of his personal presence, that his merits as a lawyer may remain in fresh remembrance, not only with us who now occupy its precincts, but with the succeeding generations, which we fondly hope will fill these seats, when we shall have followed him whom we now honor to that final judgment which is subject neither to error nor appeal.

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Pierre Soulé, making speeches in Faneuil Hall. Father Taylor, the sailor preacher in Boston, drew immense crowds to hear him on Sunday, and the law students went often to his church."

In January, 1853, the Law School received a visit from William M. Thackeray. In the same month, January 27, Reverend James Walker became President of Harvard College on the resignation of President Sparks.

In May, 1853, a Convention met in Boston to revise the Constitution of Massachusetts, to which Professor Parker and Simon Greenleaf were elected as delegates from Cambridge. Of them, R. H. Dana, Jr., who was also a delegate, said:

Judge Parker disappointed everybody. He showed himself an honest man and a good dry technical lawyer; but he discussed questions of statesmanship and public policy on the narrowest precedents and in the driest manner. . . . Professor Greenleaf seldom attended and spoke but twice. Those speeches were short and agreeable in their manner and made a rather favorable impression. Their defect was that he did not at all throw himself into his subject or into the hearts or minds of his hearers. . . . In short, the two learned professors from Cambridge had less influence than the two mercantile members from the same town.

While undoubtedly prejudiced by his difference from Parker's political views, Dana in this description marked out the chief failing in Professor Parker's methods—that of dryness—a point which will be spoken of in a later chapter on the characteristics of the Professors at this period.<sup>(1)</sup>

The Convention will always be memorable in the history of American law for the noble speech by Rufus Choate in splendid defence of an appointive Judiciary—a speech of loftiest dignity of tone and containing all that can be said upon the subject. His arguments were ably supported in speeches by Professor Parker.

#### COURSES AND ATTENDANCE.

In 1850-51, the number of students in the first term was 94.

Parker lectured on Agency, Corporations, Equity Jurisprudence and Pleadings, and Wills and Administrations. Parsons lectured on Evidence, Insurance, Contracts and Blackstone. Cushing lectured on Real Property, Roman Civil Law and Arbitration.

A course of lectures was also given by Mr. (or Count)

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(1) For most interesting accounts of this Convention, see *Richard H. Dana*, by C. F. Adams, Vol. I, and George S. Boutwell's *Reminiscences of Sixty Years*, Vol. I.



Gurowsky on the *History, Principles and Influence of Civil Law*.

In 1851-52, the number of students in the first term was 109. Judge Cushing was elected University Professor on July 16, 1851, at a salary of \$1,000, but owing to ill health was obliged to decline; and on January 31, 1852, Edward G. Loring, then Judge of Probate for Suffolk County and a United States Commissioner, was appointed as Lecturer in Cushing's place. (1)

Parker lectured on Bailments, Equity, Jurisprudence and Domestic Relations, Mortgages, Constitutional Law, Evidence and Pleading. Parsons lectured on Blackstone, Kent, Bills and Notes, Shipping and Admiralty, and Partnership. Loring lectured on Wills and Administration, Devises, and Sales.

The Visiting Committee reported to the Board of Overseers January 22, 1852:

In no country more than the United States, is the science of Law the subject of public patronage and personal attention; and nowhere, it is believed, are its studies superintended by more profound ability, or pursued by more devoted attention, than at Cambridge.

In this School, men are taught, not merely the manner of practising the law as a business of active life, but the knowledge of it as a science, and the mode of making its strict and commanding power the guardian spirit of our Republican institutions. The Committee are happy to believe that the School justly receives a high degree of popular favor.

In the year 1852-53 there were 135 students in attendance during the first term—a considerable increase. Parker substituted courses on Agency and Corporations for Bailments and Domestic Relations. Parsons substituted Insurance, for Shipping and Admiralty. Judge Loring lectured on Devises, Sales, Arbitration and Titles by Deed.

The Moot Courts continued to be of great importance in the course of instruction, and President Sparks said of them in 1849-50:

The arrangement for holding two Moot Courts each week has been continued, a portion of this part of the duty having been

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(1) Edward Greeley Loring was born in Boston, Jan. 28, 1802, son of Edward Loring. He graduated from Harvard in 1821, and studied law in the office of his first cousin, the famous Charles G. Loring (Harvard 1812). He was admitted to the Suffolk Bar in 1824, appointed Judge of Probate for Suffolk County, Dec. 17, 1847; and in 1841 a United States Commissioner.

assigned to the Lecturer, and performed by him. There is no doubt of the great value of this part of the exercises, not only to those who are assigned as counsel and conduct the arguments, but to those also who attend and take notes. The interest manifested in these Courts during the year has been very satisfactory, and the arguments in many of the cases heard in them are such as would do credit to any bar in the United States. The annual Moot Court jury case was one of more than ordinary interest. (1)

Many of the graduates of those days now write that they regard their Moot Court work as one of the greatest advantages gained at the School.

The opinions delivered by the Professors were also written with remarkable ability. "It was not an uncommon occurrence to see lawyers from Boston in the room listening and taking notes of the arguments", writes Alexander Wilson (L. S. 1851-53). No pains were spared the opinions authoritative statements of law, framed with great precision and after considerable study, although "frequently", writes one of the Moot Court counsel, "I fear drawn up before hearing the arguments."

As in Story's time, the cases given out for argument were frequently actual cases pending or recently argued in court. Thus it is interesting to find that Professor Parker presided over a case, May 20, 1851, involving the conflict between State and Federal judicial authorities—a subject on which the great judicial battle had arisen in 1842 between Parker as Chief Justice of New Hampshire and Story sitting in the United States Circuit Court. This Moot Court Case, *U. S. v. Humphrey Jackson*, as appears from the Moot Court book of C. R. Codman (L. S. 1851-52) was an indictment of a State Marshal for a rescue from the custody of the United States Marshal of a prisoner indicted for larceny in the United States Circuit Court. The case was undoubtedly given out because of the recent indictment in Boston of the persons engaged in the attempted rescue of the fugitive slave, Shadrach.

It was argued by Sidney D. Miller (L. S. 1850-51) for the prisoner and by John Ordronaux (L. S. 1851-52) and George W. Field (L. S. 1850-51) for the United States.

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(1) In his 26th *Annual Report*, Sparks said:

"The annual Moot Court jury case exerted a lively interest, and furnished evidence of the value of an occasional exercise of that character, with assurance that the counsel engaged will do honor to the profession they have chosen."

## CHAPTER XXXIII.

### THE ANTI-SLAVERY PERIOD II.

At the opening of the fall term of 1853-54 occurred the death of Simon Greenleaf on October 6. Services commemorative of his life and labors for the School were held in the First Church in Cambridge on October 20, at which Professor Parsons delivered a most appreciative, tender, and personal address.

As the number of students had now grown to 148 (156 in December, "notwithstanding the increased expenses of living, the pressure of the times, and other adverse influences,"—an increase of 75 per cent. over the number at the spring term of 1849—Professors Parker and Parsons were convinced of the necessity for the immediate appointment of a third Professor; and in an urgent letter to the Corporation, Dec. 23, 1853, they described the pressure upon them, in lecture work, in the duties of supervision and government, and in their "personal intercourse with the students and direct instruction to individuals". They suggested that such new Professorship, with a salary of \$2,500, and the same duties as those imposed on the other Professors, be offered to the then Lecturer, Edward G. Loring, who had been appointed Jan. 31, 1852, and "whose services so far as we know are very useful and entirely satisfactory".

Accordingly, the Corporation voted, Dec. 23, 1853, to establish the office of University Professor of Law, and chose Edward G. Loring to fill the place. (1)

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(1) The Corporation at this time consisted of President James Walker, Chief Justice Lemuel Shaw, Charles G. Loring, Rev. George Hayward, John Amory Lowell, and the Treasurer William T. Andrews. The vote was as follows:

"Whereas the great increase in the number of students attending the Law School has rendered it necessary to provide larger and more ample means of superintendence and instruction, and at the same time has increased the means of affording such increased superintendence and instruction.

*Voted* that there be and there is hereby established the office of University Professor of Law, the Professor holding this office to perform all the duties of superintendence and instruction in the Law School in connection with the Royall and Dane Professors, the distribution and arrangement of these duties to be made by the three Professors. This Professorship is to be subject to all the statutes and by-laws which have been or

This vote precipitated a bitter and heated conflict between the Corporation and the Board of Overseers, which was so closely connected with the excitement prevailing at this time over the slavery question and the Fugitive Slave Act, that it deserves a detailed description.

The question of concurrence in the vote of the Corporation was presented to the Board of Overseers, February 9, 1854, and on motion of Robert C. Winthrop, referred to a Committee consisting of Francis Bassett, Richard Fletcher and Samuel Hoar.

At this time, the new statute of Massachusetts, under which ten Overseers were elected by the Legislature, had gone into effect. The Legislature was controlled by the Whig party; Emory Washburn was Governor; and the Overseers just elected, Jan. 27, 1854, were John H. Clifford, Attorney General of Massachusetts, Richard Fletcher, George Morey, Abbott Lawrence, Marcus Morton, Reuben A. Chapman, Joel Hayden, Rev. George W. Blagden, Rev. Nathaniel Cogswell, Rev. Baron Stow, and Rev. Thomas Worcester.

On March 9, 1854, the Committee presented an adverse report, stating that the old system had been tried and found to work well and prosperously and should not be lightly broken up or disturbed; and that there was serious objection to a permanent Professorship without a certain and permanent fund for its support.

There are advantages in being able to apply the surplus funds beyond the wants of the two permanent Professors from time to time in such manner as the best interests of the School may require.

Some variety in the mode of instruction and some variety in the talents and attainments of persons employed, may be of value and service to the School. . . .

Eminent men may at times be obtained to lecture on special branches of the law to which they have paid particular attention, to the great advantage and credit of the School.

By bringing occasionally new men who are fresh and ardent

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may be hereafter made for the regulations and government of the Law School in this University.

*Voted* that until further order, the Professor to be elected on this establishment shall not be required to reside at Cambridge.

*Voted* that the salary to be paid to the University Professor of Law be \$2,500 a year.

*Voted* that this Board do now proceed to elect a University Professor of Law. Whereupon ballots being given it appeared that Edward Greely Loring Esq. of Boston was unanimously elected."

in their work, both teachers and pupils may be quickened and animated in giving and receiving instruction.

The real gist of their report, however, was contained in that portion which referred to the particular person chosen. The objections which they made to Judge Loring were that it was improper for a Professor to continue to hold the office of Judge of Probate, the duties of which were manifold and of peculiar importance to the community, and that such a man could not perform faithfully both duties, and further that the exemption from residence in Cambridge would be particularly disastrous to the interests of the School, in view of the fact that supervision and personal association with the students was especially desired. Judge Story's case was held to have been peculiar :

His great fame, great talents and great attainments enabled him to do more for the School with all his judicial duties upon him than could be done by any other man who was free from such duties.

But Judge Story was an extraordinary man and his case forms an exception and not a rule. The duties of a Professor who is to share the responsibility of the charge and oversight of the School should have the first claim on his time and abilities.

The high rank and great importance of this institution require that it should be always under the care and control of able men who will give to it their best effort and look to it as the field of their duty, their usefulness and fame.

Such were the reasons alleged by the Committee for non-concurrence. The real fact, however, was, that Judge Loring was personally and politically unpopular with the strong anti-slavery men on the Board, owing to his holding the office of United States Commissioner, before whom the cases under the Fugitive Slave Law might be brought.

On March 9, 1854, the Board of Overseers discussed the report and voted to lay it upon the table. As it was evident that the Overseers would act adversely, the Corporation decided to withdraw its votes, and accordingly on March 18, so voted.(1)

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(1) See *Corporation Records*:

"This Board having thought it expedient again to take into consideration the subject of the establishment of a University Professor of Law according to the vote passed at a meeting of this Board on 23 December last.

*Voted* that the vote establishing the University Professorship above stated, together with the vote directing the same to be laid before the Board of Overseers, be and the same are hereby rescinded and withdrawn.

On April 11, 1854, both Professor Parker and Professor Parsons wrote to the Corporation, urging that Judge Loring, in spite of his rejection by the Overseers for the new Professorship, should be reappointed as a Lecturer, at a salary of \$1,500 a year.<sup>(1)</sup> Meanwhile, Loring was still serving in that capacity, to the great satisfaction of the Professors and with great popularity among the students—little anticipating the storm that was to break over him, to wreck his judicial career in Massachusetts, and to destroy all his hopes of continuance at the Law School. This storm arose out of a case in Boston which threw not only Boston and Harvard College, but all Massachusetts, into a state of feverish excitement—and which has left its impress on the Law School's history, by causing the removal of a popular Instructor and the accession of one of its most valued Professors.

On May 24, 1854, a negro, named Anthony Burns, was arrested by a deputy United States Marshal in Boston, on a charge of breaking into a jewelry store. Being carried at once into the United States court room, he was there claimed as a fugitive slave by one Charles T. Suttle, of Virginia. The warrant for the arrest of the fugitive had been issued by Edward G. Loring as United States Commissioner. Richard H. Dana, Jr., May 25, being casually told of the occurrence, went to the court room, and finding the negro dazed and without counsel asked for delay. This

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*Voted* that the President be requested to lay this vote before the Board of Overseers at their next meeting."

March 12, 1854, L. S. Cushing wrote to Professor Parsons (See *Harv. Coll. Papers*, 2nd Series, Vol. XX.):

"The turn which the establishment of the University Professorship of Law has taken with the Overseers is so extraordinary that I cannot forbear making a suggestion respecting it which occurs to me and which possibly may be of some use to you. In 1816, Chief Justice Isaac Parker was appointed Royall Professor of Law, the duties of which were then discharged by the delivery of a short course of lectures annually to the undergraduates, and had nothing to do with the instruction of Law students. This professorship had been established probably many years before. In the next year, 1817, the law school was created and established on the footing on which it has ever since stood. The statutes establishing the school provided among other things for the appointment of a professor to be styled the University Professor and prescribed his duties. Mr. Stearns received the appointment and held the office until the year 1829, when he and Judge Parker resigned. . . . The suggestion I would make is whether the old University professorship has ever been abolished or abrogated. If not, the opposition in the overseers would be reduced in form to what it is, in fact, an objection to Mr. Loring."

(1) See letters of Parker and Parsons to the Corporation, April 11, 1854.

Letter of Parsons to C. G. Loring, April 27, 1854.

Letter of Parsons to President Walker, August 8, 1854, *Harv. Coll. Papers*, 2nd Series, Vol. XX.

was opposed by Edward G. Parker, counsel for the claimant. Dana's own account gives a vivid picture of the very considerate action of Loring in the matter, and shows how harshly unjust were the attacks upon him that followed.

The commissioner, Edward G. Loring, at my private suggestion, called the prisoner to him and told him what his rights were, and asked him if he wished for time to consider what he would do. The man made no reply and looked round bewildered, like a child. Judge Loring again put the question to him in a kind manner, and asked him if he would like to have a day or two, and then see him there again. To this he replied faintly, "I would". The judge then ordered a delay until Saturday.

The conduct of Judge Loring has been considerate and humane. If a man is willing to execute the law, and be an instrument of sending back a man into slavery under such a law, he could not act better in his office than Judge Loring. He professes to detest the law, but he will follow the rigid construction the courts have put upon it as matter of duty. . . .

May 26. Friday. As the negro was uncertain whether to make a defence or to have counsel at all, I felt that it was improper for me to intrude myself upon him. If any were to advise, it should be others than a lawyer who had once offered to act. At my suggestion, Rev. M. Grimes and Deacon Pitts (the clergyman and deacon of the congregation of colored people) and Wendell Phillips asked leave of the marshal to see him. This was refused. They asked him if it would be of any use to obtain an order from Judge Loring to admit them. He said it would not. They then returned to me. I told them at least to compel Mr. Freeman to refuse it, and wrote a note to Judge Loring (who was at Cambridge, lecturing at the Law School), stating to him that I scarcely felt at liberty to act as counsel for the man and was unwilling to obtrude myself upon him, and that the proper persons to see him and ascertain his wishes had been refused admission. To this Judge Loring responded in a note to Freeman, telling him that it was the man's right to see a few friends, and that if any reasonable number, two or three, wished to see him, their names must be taken to him, and their purpose stated to him, and if he desired to see them, they must be admitted.

Rufus Choate having refused the request of several prominent Free Soilers to act as counsel for Burns, Richard H. Dana, Jr. and Charles M. Ellis were then engaged.

Meanwhile the sentiment in Boston and over the State had rapidly risen in favor of the fugitive. Since the Sims case, three years before, a great change had come over the political feeling of Massachusetts. Webster was dead and his compromise meas-

ures of 1850 had proved utter failures. The infamous Kansas-Nebraska bill had passed the Senate on March 4, 1854,<sup>(1)</sup> and on May 25, 1854, the day after the arrest of Burns in Boston—President Pierce signed this bill—"the most momentous measure ever passed by Congress. It sealed the doom of the Whig party; it caused the formation of the Republican party on the principle of no extension of slavery. It raised Lincoln and gave a bent to his great political ambition. It made the fugitive slave law a dead letter at the North; it caused the Germans to become Republicans; it lost the Democrats their hold on New England; it made the Northwest Republican and led to the downfall of the Democratic party."<sup>(2)</sup> "Pierce and Douglas", said Horace Greeley, "have made more abolitionists in three months than Garrison and Phillips could have made in half a century."

The situation in Boston on May 26, was thus described by Dana:

Tonight a great meeting is to be held at Faneuil Hall. There is a strong feeling in favor of a rescue, and some of the abolitionists talk quite freely about it. But the most remarkable exhibition is from the Whigs, the Hunker Whigs, the Compromise men of 1850. Men who would not speak to me in 1850 and 1851, and who enrolled themselves as special policemen in the Sims affair, stop me in the street and talk treason. This is all owing to the Nebraska bill. I cannot respect their feeling at all, except as a return to sanity. The Webster delusion is passing off.

Amos A. Lawrence called to offer any amount of retainer to enable me to employ some eminent Whig counsel. He said he was authorized to do this by a number of active 1850 men, who were determined it should be known that it was not the Free Soilers only who were in favor of the liberation of the slaves, but the conservative, compromise men.

In this suggestion I called on Judge Fletcher and Mr. Choate. Judge Fletcher said that his sympathies were with us, and if there should be a rescue, he would not lift a finger to prevent it, but that he was under an especial engagement with the *Reporter* which did not leave him an option as to his time.

Choate I had an amusing interview with. I asked him to make one effort in favor of freedom, and told him that the 1850 delu-

(1) "As the senators went home on this sombre March morning, they heard the boom of the cannon from the Navy Yard proclaiming the triumph of what Douglas called "popular sovereignty." Chase and Sumner, who were devoted friends, walked down the steps of the Capitol together, and as they heard the thunders of victory, Chase exclaimed "they celebrate a present victory, but the echoes they awake shall never rest until slavery itself shall die." Rhodes' *History of the United States*, Vol. I.

(2) Rhodes' *History of the United States*, Vol. I.



sion was dispelled, and all men were coming round, the Board of Brokers and Board of Aldermen were talking treason, and that he must come and act. He said he should be glad to make an effort on our side, but that he had given written opinions against us in the Sims case on every point, and that he could not go against them.

"You corrupted your mind in 1850."

"Yes. Filed my mind."

"I wish you would file it in court, for our benefit."

Mr. Charles G. Loring was out of town, and there was no one else that I thought would answer Mr. Lawrence's description.

On May 27, a mob, led by Rev. Thomas Wentworth Higginson, then of Worcester, broke into the court house and attempted to rescue Burns, but were repulsed.(1) Immediately after this a company of United States marines and a company of artillery, together with several State militia companies, were summoned to guard the court house. The hearing on the case was held on May 27, 29, 30 and 31.

There were frequent instances of men prohibited from going into the courts of the State, and no one was permitted to enter the court-house, judges, jurors, witnesses or litigants, without satisfying the hirelings of the United States marshal that they had a right to be there. All this time there were, or attempted to be, in session in the building, the Supreme and Common Pleas Courts of Massachusetts, and the Justices' and Police Courts of Boston. In most cases these courts adjourned for want of business. Thus the judiciary of Massachusetts has been a second time put under the feet of the lowest tribunal of the federal judiciary in a proceeding under the Fugitive Slave Law. Judge Shaw, who held the Supreme Judicial Court, is a man of no courage or pride, and Judge Bishop, who held the Court of Common Pleas is a mere party tool, and a bag of wind at that. It was the clear duty of the court to summon before it the United States marshal to show cause why he should not be committed for contempt, and to commit him, if it required all the bayonets in Massachusetts to do it, unless he allowed free passage to all persons who desired to come into either of the courts of the State.(2)

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(1) T. W. Higginson, Theodore Parker, Martin Stowell, John Morrison, Samuel T. Proudman and John C. Cluer were indicted in the United States Circuit Court, in November, 1854, for being engaged in this attempt. The trial occurred April 3, 1855. John P. Hale of New Hampshire and Charles M. Ellis were counsel for Parker. John A. Andrew, Henry F. Durant and William L. Burt were counsel for the other defendants. B. F. Hallett, U. S. District Attorney, appeared for the Government. The trial resulted in an acquittal.

(2) *Richard H. Dana*, by C. F. Adams.

Of peculiar interest to the Law School was the fact that "besides the general guard which the United States Marshal had, to keep his prisoner, there was a special guard of Southern men, some of them law students from Cambridge, who sat around Col. Suttle and went in and out with him."

On June 2, the day when Judge Loring was to give his decision, Boston and the entire State were alive with excitement. The Mayor of Boston had ordered out the entire military force of the city, 1,500-1,800 men, who, with three companies of United States regulars, filled the streets and squares from the court house to the wharf, where lay the United States revenue cutter, ready to take Burns back to Virginia. Judge Loring's decision was in favor of the claimant. The prisoner was at once taken under guard, down Court and State Streets, between shops hung with black; and preceded and followed by troops he was placed safely on board the cutter. So ended this famous case.

Its after-effects, however, were long to be felt. Dana thus described the change in public sentiment:

Men who were hostile or unpleasant in 1851 are now cordial and complimentary, and the prevailing talk among merchants and lawyers is that of hostility to slavery and the slave-power. It is all fair weather sailing now. This case is precisely the same as that of Sims. But then we were all traitors and malignants, now we are heroes and patriots. The truth is, Daniel Webster was strong enough to subjugate, for a time, the moral sentiment of New England. He was defeated, killed, and now is detected. He deceived half the North, but they are undeceived. He does not stand as he did six months ago. . . .

James Russell Lowell wrote, May 29, 1854:

Is not all this about that poor fugitive Burns nasty? I can find no other word. I do not like to think that the natural instincts of Massachusetts are all snobbish, but it would take a good deal to convince me that they are not. . . While the Virginia newspapers are descanting on the meritoriousness of shooting Yankee schoolmasters, they are inviting a Virginia slave hunter to dinner. By St. Paul! if things go on and the old Puritan Spirit once gets up again (if it be not dead) we may send them schoolmasters such as Oliver sent to Ireland.

Longfellow wrote in his diary:

May 26, 1854. Yesterday a fugitive slave was arrested in

Boston. Today there is an eclipse of the sun. "Hung be the heavens in black!"

May 27. Last night there was a meeting in Faneuil Hall and afterwards an attempt at rescue which I am sorry to say failed. I am sick and sorrowful with this infamous business. Ah, Webster, Webster, you have much to answer for!

May 29. The air is pestilential with this fugitive slave case.

May 30. The slave case drags along. There is great and widespread excitement and a healthy one. The general feeling is "We will submit to this no longer, come what may!"

June 2. The fugitive slave is surrendered to his master and being marched through State Street with soldiery, put on board the U. S. Revenue cutter. Dirty work for a country that is so loud about freedom as ours!

The *Springfield Republican* said editorially, June 3:

Law and order and slavery and bayonets and slave catchers triumph—and such scenes as God forbid shall ever be witnessed in Boston again.

Josiah Quincy wrote in his diary:

June 2. Left Boston as early as possible to avoid the painful scene of a human creature restored to bondage by the arm of the law. The public sentiment so averse to the measure, that a body of troops and cannon loaded were deemed requisite to carry the law into execution—such was the opposition manifested. Events indicative of discontents, which are at no distant period, if not removed, to be the source of irretrievable discords and dangers to the continuance of our Union.

Such being the feelings freely expressed on all sides, the public demanded a victim, and found it in the person of the mild and upright Judge—the United States Commissioner who under his oath had no choice but to carry out the law as laid down by the courts—Edward G. Loring.

The first attack upon him in his connection with Harvard College was by W. S. Robinson, "Warrington", in the *Boston Daily Commonwealth*, June 3, 1854:

The deed of shame has been done. Boston is again disgraced. Massachusetts is prostrate today at the feet of the slaveholders; yes, at the feet of one slaveholder.

This decision, while it illustrates that complete negation of all law which is the characteristic and animating principle of the Fugitive Slave Bill, also illustrates, in an unmistakable manner,

the character of Edward G. Loring. He needs not to be called names, if names bad enough could be found for him. He ought to be forever held infamous by the people of Boston and of Massachusetts. . . . Let him be a marked man forever. Let Harvard College be required to repudiate his teachings, and the Legislature compelled to fill his judicial station with another and better man. Let the public sentiment which he has outraged follow him. Let it concentrate itself upon him.

This vicious onslaught was followed up by similar attacks in other newspapers; and the anti-slavery men of the community in their animosity towards Loring, completely lost their heads. The question of his appointment as Lecturer in the Law School was at this time pending before the Corporation, and at once became a storm centre for a furious tempest of opposition in College circles. The Corporation was, however, inclined to stand firm. On July 28, 1854, Charles G. Loring wrote to Walker that he saw no reason why the Corporation should "demur to do its duty because a few malignants in the Overseers may be disposed to make trouble", and that as it was plain that a fight was inevitable, the Corporation ought to be ready for it—especially in view of the fact that Loring had acted on the faith of his understanding with the Corporation and given up much law business to take up his Law School work.<sup>(1)</sup>

The Professors of the Law School were vigorous in urging Loring's retention, as being a very "useful and acceptable" man. The students were enthusiastically in his favor, for he was extremely popular with them.

Accordingly on August 26, 1854, the Corporation took action:

The Chief Justice for the Committee on the communication of the Law Faculty reported "That they recommend the re-appointment of Mr. Loring to the Lectureship in the Law School."

Whereupon it was

*Voted* that Hon. Edward G. Loring be re-appointed Lecturer in the Law School.

*Voted* that the President be requested to lay this appointment before the Board of Overseers that they may concur therein if they see fit.

(1) See interesting letters of Loring to Walker of July 28, 1854; letter of Walker to Loring, Aug. 25, 1854; letter of Parker and Parsons to Corporation, Sept. 1854; *Harv. Coll. Papers*, 2nd Series, Vol. XXI.

See also letter of Loring to Walker, Jan. 20, 1855. *Harv. Coll. Papers*, 2nd Series, Vol. XXII, calling attention to the fact that while he was only engaged to perform one-fifth of the duties, he had actually performed one-third. See Vote of Corporation, Aug. 20, granting Loring \$750 for extra services.



**Edward Greely Loring**



In the state of popular feeling, it was unlikely that Loring's appointment would be confirmed by the Overseers. There were some few anti-slavery men, however, who remained sane; and their views were well expressed in an anonymous pamphlet addressed to the Overseers—an address which contains such convincing arguments of the falseness of the position taken by Loring's opponents, that it is here reproduced in full:

Intimations have been given of the existence, in certain quarters, of a purpose to oppose the confirmation of Judge Loring by the Board of Overseers, as Lecturer at the Law School, because he has acted as a Commissioner in the execution of what is called the Fugitive Slave Law. Judge Loring has filled the place of Lecturer very usefully for several years, and is now again nominated to it by the Corporation. If such a purpose as that above referred to is entertained, a grave question is likely to arise in the management of the College. It is no less than this: Will the Overseers reject a nominee of the Corporation, whose services that Corporation has ascertained to be valuable to the Law School, because he has acted as Commissioner in the rendition of a fugitive slave?

No one, it is presumed, would wish to punish Judge Loring for the existence of the Fugitive Slave Law, or for the existence of that clause in the Constitution of the United States which the Judges of the Supreme Court of Massachusetts have unanimously declared to be the authority for the enactment of the Law. Judge Loring is responsible neither for the Law, nor for the Constitution, nor for the authoritative declaration of the Supreme Court of this State that the Law is in conformity to the Constitution. All that anybody can undertake to hold him responsible for, is the having acted as a magistrate in the execution of this Law; and therefore, it is respectfully suggested, what the Board of Overseers have to consider, is, whether it is either just or expedient to reject him, or to allow it to be said that he has been rejected for this reason.

There are those who have taken the ground that the moral feeling of Massachusetts ought to be vindicated by Judge Loring's rejection. If there is any feeling that demands to be vindicated in this way, it can only be one that is prepared to say, that whoever, as a magistrate, shall execute the laws of the United States for the rendition of fugitive slaves, shall be, ipso facto, incapacitated to be a professor or lecturer at the Law School of Harvard College. Will the Board of Overseers either make this declaration, or act upon it without making it, or put it in the power of other persons to say that they have acted upon it?

Do the Board of Overseers feel at liberty to administer the concerns of the Law School entirely with reference to the supposed, or real, sentiments of Massachusetts? The Law School is

an institution, which, while it is governed by citizens of Massachusetts, and is part of a University connected indirectly with the State, yet *sustains relations*—and very important ones—to the whole country. It has thus far drawn a great many students from the South; and no one will doubt that it is quite important to have young men from the South receive their legal education in New England, where they can learn something of our laws and our institutions, see something of our social system, and become interested in what concerns our welfare. It has been remarked by those who have had occasion and opportunity to notice the fact, that the Law School of Harvard College, since its revival in 1829, has been a very powerful instrument *in removing and softening sectional prejudices*. The great number of gentlemen who have resorted hither from distant parts of the Union, have gone home and entered the legal profession, and have risen to high and important stations, with sound views of constitutional law, and with enlarged and liberal minds. If you meet with a Southern lawyer or politician, who is a secessionist, or a nullifier, or a hater of New England, you will rarely find that he was educated at Dane Law College. The men of the South and Southwest who bear an LL.B. after their names, and who obtain that degree at Cambridge, are seldom found saying or doing anything against us or our interests. They have got too much of the staple of their minds and characters from that noble institution to allow of their nourishing unworthy prejudices against the North. There is many a man in high public position in slave-holding States who was educated under Judge Story and his colleagues in instruction, and who admires and respects New England, and hopes always to retain kind feelings towards her, to transmit such feelings to those who are to come after him, and to have them trained under the same or similar influences.

Is it worth while to turn this current of students from our doors? What is to be gained by it? Is it worth while to proclaim through the land, or to allow others to proclaim, that our Law School is never to admit into one of its chairs of instruction any person who has acted simply as a magistrate in the rendition of a fugitive slave? Is it expedient to allow others to say, that a man who has already served in one of those chairs to the acceptance of the Faculty, has been ejected from it, because as a magistrate he has executed this law of the United States? What Southern parent would send a son here for his legal education, after he had seen cause to believe that a professor or a lecturer had been dismissed from the Law School for such a reason?

It will not do to say that the South may keep their sons at home—that the Law School does not want them. *The Law School wants every student from every quarter of the country, whom a broad and liberal management can attract to its halls.* It wants them, because it is for the interests of sound legal learning, good statesmanship, and the cultivation of good feeling be-



tween distant sections, that they should come here. We have the means in our hands of promoting these interests, to a very great extent; and we are bound to use those means as a Trust for the benefit of the whole country.

It is worth while to look back for a few years, and to see what would have been the effect of a practical application at a former period by the Board of Overseers, of such a principle of action as would be involved in the rejection of Mr. Loring, for the reason we are now considering. *It would have caused the rejection of Joseph Story from the Dane Professorship*; for he, too, had, before he was nominated to that chair, taken part in the execution of the Fugitive Slave Law of that day. . . .

And there is no more just ground for saying now that the moral feeling of the State requires the rejection of Judge Loring, than there would have been in that day for saying that it required the rejection of Judge Story. Whether done now, or done then, the rejection of a professor, or lecturer *for this cause*, would be precisely the same declaration, namely, that a magistrate who executes the laws of the United States for the rendition of fugitives, shall not, however well qualified he may be, be a teacher at the Law School of Harvard College. If this principle of action had been adopted in 1829, would Massachusetts ever have had such a Law School as she has had for nearly thirty years? Would the Law School of Harvard College ever have been of any more importance than it had been before the year 1829? Would it ever have had Nathan Dane's donation? Would it ever have had Judge Story as Professor and the great accession of income which he earned for the institution in a service of sixteen years, the accumulations of which are now part of its invested funds? The great usefulness of that institution depends upon this capacity to draw students from every part of the country; *and it is the only Law School in this Union, that has that capacity, in any important degree.* May it be long, before this capacity is lost.

The Overseers, however, Governor Gardner presiding, on February 15, 1855, refused to concur with the Corporation, by a vote of 10 to 20. At this meeting, the following men, prominent in public life, were present: Abbott Lawrence, George S. Boutwell, George N. Briggs, Reuben A. Chapman, John H. Clifford, Samuel Hoar, Emory Washburn, Robert C. Winthrop, James Walker, and twenty-one others, including the Lieutenant Governor, the President of the Senate, the Speaker of the House, the Secretary of the Board of Education and seven Clergymen.(1)

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(1) The *Boston Daily Advertiser* of Feb. 16, 1855, says that though the vote was by ballot it was understood to have been as follows—for Loring; Emory Washburn, John H. Clifford, Abbott Lawrence, Robert C. Winthrop, Reuben A. Chapman, Rev. E. S. Gannett, Rev. G. W. Blagden, Rev.

The matter being thus settled, the Law Faculty sought some other man for the position, and finally, largely on Parsons' recommendation, on a report of Chief Justice Shaw and Charles G. Loring, the Corporation, by votes of March 17 and May 18, 1855, voted to appoint as Lecturer at a salary of \$1500 Emory Washburn, who had just been defeated for the Governorship.<sup>(1)</sup>

Of this vote the *Boston Daily Advertiser* said March 19, 1855:

This is an excellent appointment and one to which we do not see that any objection can be raised. . . . It will doubtless be an additional recommendation in some quarters that ex-Governor Washburn is neither a graduate of Harvard College nor a Unitarian.

March 9, 1855, Governor Gardner appointed Professor Parker as a Commissioner together with William A. Richardson of Lowell and Andrew A. Richmond, to revise, consolidate and arrange the general statutes of Massachusetts.<sup>(2)</sup> Parker entered

T. Worcester, Rev. James Walker, W. T. Walker (10); against Loring; Governor H. J. Gardner, Lieut. Gov. S. Brown, H. W. Benchley, President of the Senate, Daniel C. Eddy, Speaker of the House, Rev. Barnes Sears, Sec. of the Board of Education, ex-Gov. George N. Briggs, ex-Gov. George S. Boutwell, Samuel Hoar, S. D. Bradford, Francis Basset, George Morey, Nathaniel B. Shurtleff, Joel Hayden, Thomas Russell, D. W. Alvord, N. Cogswell, H. B. Wheelwright, Rev. Hosea Ballou, Rev. R. A. Miller, Rev. J. H. Twombly (20).

The following members were absent, Caleb Cushing, David Sears, Marcus Morton, Julius Rockwell, Richard Fletcher, Rev. B. Stow, S. M. Worcester (7).

The opponents of Judge Loring did not rest with this successful attack upon him. The Massachusetts Legislature in 1855 attempted to procure his removal as Probate Judge; but Governor Gardner declined to remove him (see Message of May 30, 1857). Governor Banks, however, yielded to their desires and removed him from office on March 15, 1858. Within two months, Loring was appointed by President Buchanan as Judge of Court of claims in Washington, which position he held until 1877. He died June 19, 1890.

For interesting accounts of the proceedings in the Legislature, see *Richard H. Dana*, by Charles Francis Adams; also *Life of William Adams Richardson*, by Frank W. Hackett; and *The Removal of Judge Loring in Law Reporter*, Vol. XVIII (May, 1855).

(1) The vote was concurred in by the Overseers, March 22, 1855, by a unanimous vote.

See also letters of Parsons to Walker, February 23 and 25, 1855. *Harv. Coll. Papers*, 2nd Series, Vol. XXII.

Parker wrote to President Walker Feb. 25, 1855, (*Harv. Coll. Papers*, 2nd Series, Vol. XXII): "If the Corporation shall deem it expedient to make another appointment, I can only say that I know no person more likely to give satisfaction than Gov. Washburn."

(2) The labors of this Commission were not completed until the autumn of 1858; and their report was submitted to the Legislature in January, 1859. The whole of the work during the last year of its progress had fallen on Parker and Richardson, as Richmond was disabled by illness.

on the work with vigorous interest and at once gave up half of his Law School duties and salary to Washburn. He also expressed his readiness to resign at any time if the Corporation should desire. (1) The Corporation was far from desiring any such arrangement; as they highly esteemed "the benefit of Parker's great experience and eminent qualifications as an instructor," and they voted to excuse him from half his duties and to fix his salary at \$2000. The loss of so much of Parker's time, however, made it imperative that the project for a third Professorship should be again taken up.

On January 26, 1856, the office of University Professor of Law was again created, the Professor to be a member of the Law Faculty and charged with the same duties of government and instruction as the other Professors, except that he was not to be obliged to reside in Cambridge, until so required by the Corporation; and on February 23, Emory Washburn was appointed to fill the new chair. These votes of the Corporation were concurred in by the Overseers on February 14 and 28, 1856; and thus the struggle between the two governing bodies was ended. (1)

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A special session of the Legislature was held in September, and the revision as modified by the work of a Recess Committee of the Legislature, was enacted Dec. 28, 1859, as the "General Statutes."

(1) See letter of Parsons to Walker, Dec. 28, 1855. *Harv. Coll. Papers*, 2nd Series, Vol. XXII.

Letter of Parker to Corporation, Jan. 1856. *Harv. Coll. Papers*, 2nd Series, Vol. XXIII.

See also Report of Committee of Corporation, adopted Aug. 25, 1855.

(1) See long explanatory Report of Committee of Board of Overseers of which Francis Bassett was again Chairman, presented Feb. 14, 1856.

The statutes of the University Professorship finally adopted were as follows:

"That there be established a University Professorship of Law subject to the statutes and Regulations herein provided.

I. A University Professor of Law shall be appointed by the President and Fellows of the College with the consent of the Overseers, who shall perform such duties of instruction and government in the Dane Law School as may from time to time be required of him, and hold his office during the pleasure of the President and Fellows and Overseers.

II. The University Professor of Law thus appointed shall be a member of the Law Faculty of the Dane Law School and, with the President and other members of the Faculty, shall be charged with the Government and instruction of the School.

III. Until the further order of the President and Fellows of the College, it shall be the duty of the University Professor to perform the duties of lecturing and attending the other exercises of the School which have been heretofore performed by a Professor; but it shall not be deemed the duty of the University Professor thus appointed to reside at Cambridge until required by an act of the President and Fellows, and reasonable notice thereof given to such Professor.

IV. This Professorship shall continue until the President and Fellows

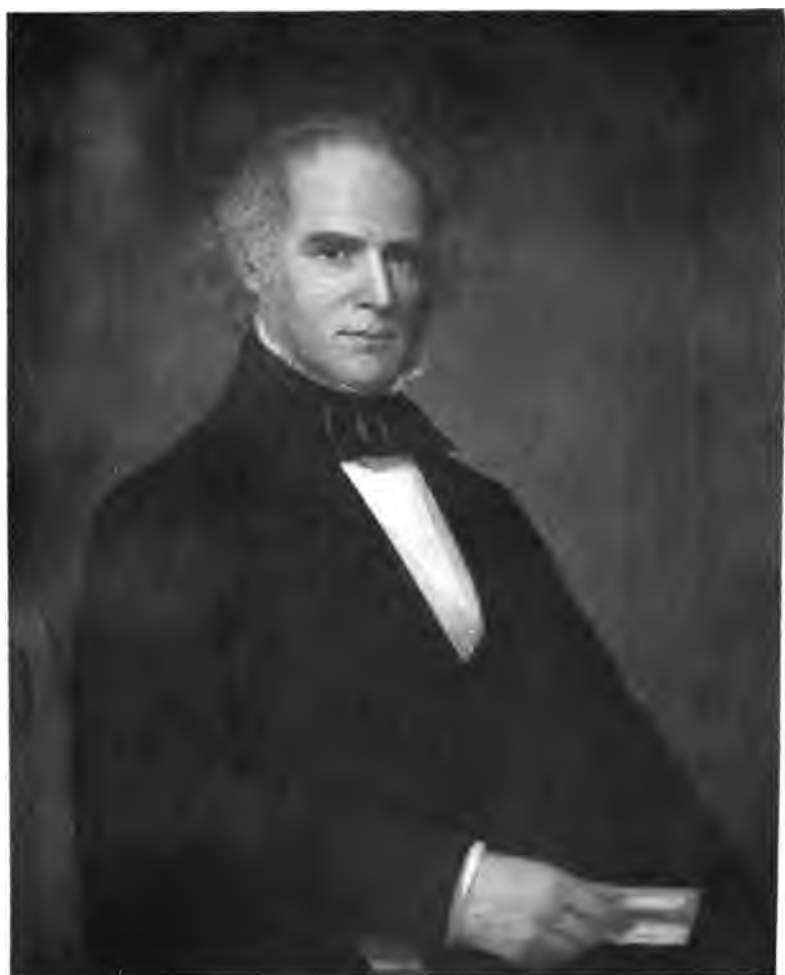
## EMORY WASHBURN.

Emory Washburn was born in Leicester, Mass., February 14, 1800. His father died when he was seven years old and he was brought up by his mother. He was fitted for college at Leicester Academy, and entered Dartmouth, influenced by the fact that the pastor of the church in Leicester, Rev. Zephaniah S. Moore, was Professor of Ancient Languages in that College. In 1815 Rev. Mr. Moore was made President of Williams College, and being greatly interested in Washburn, took him there as a member of his own family. Washburn graduated in 1817, the year of the founding of the Harvard Law School, and commenced the study of law with Judge Dewey of the Massachusetts Supreme Court. In 1819-20, he studied at the Harvard Law School under Professor Stearns; and in 1821, he was admitted to the Bar. In 1826 and 1827, he was a member of the State Legislature and in behalf of a committee of the House made the first report that suggested the feasibility of a railroad between Boston and Albany. He settled in Worcester in 1828, where he lived until his removal to Cambridge in 1856. The many offices, municipal, educational, literary, and charitable, held by him in after years, testify to the confidence reposed in him by the public. Among these numerous offices were—member of the State Board of Education, Trustee of Williams College, member of the International Code Committee, President of the Trustees of the School for the Idiotic and Feeble minded, Director of the American Social Science Association, President of the Trustees of Donations for Education in Liberia, member of the Massachusetts Historical Society, the American Antiquarian Society, and the American Academy of Arts and Sciences. At the same time, he acquired a very large law practice. He served in the State House of Representatives again in 1838, and in the Senate as Chairman of the Judiciary Committee, in 1841 and 1842. He was appointed Judge of the Court of Common Pleas in 1844, and served until 1848.

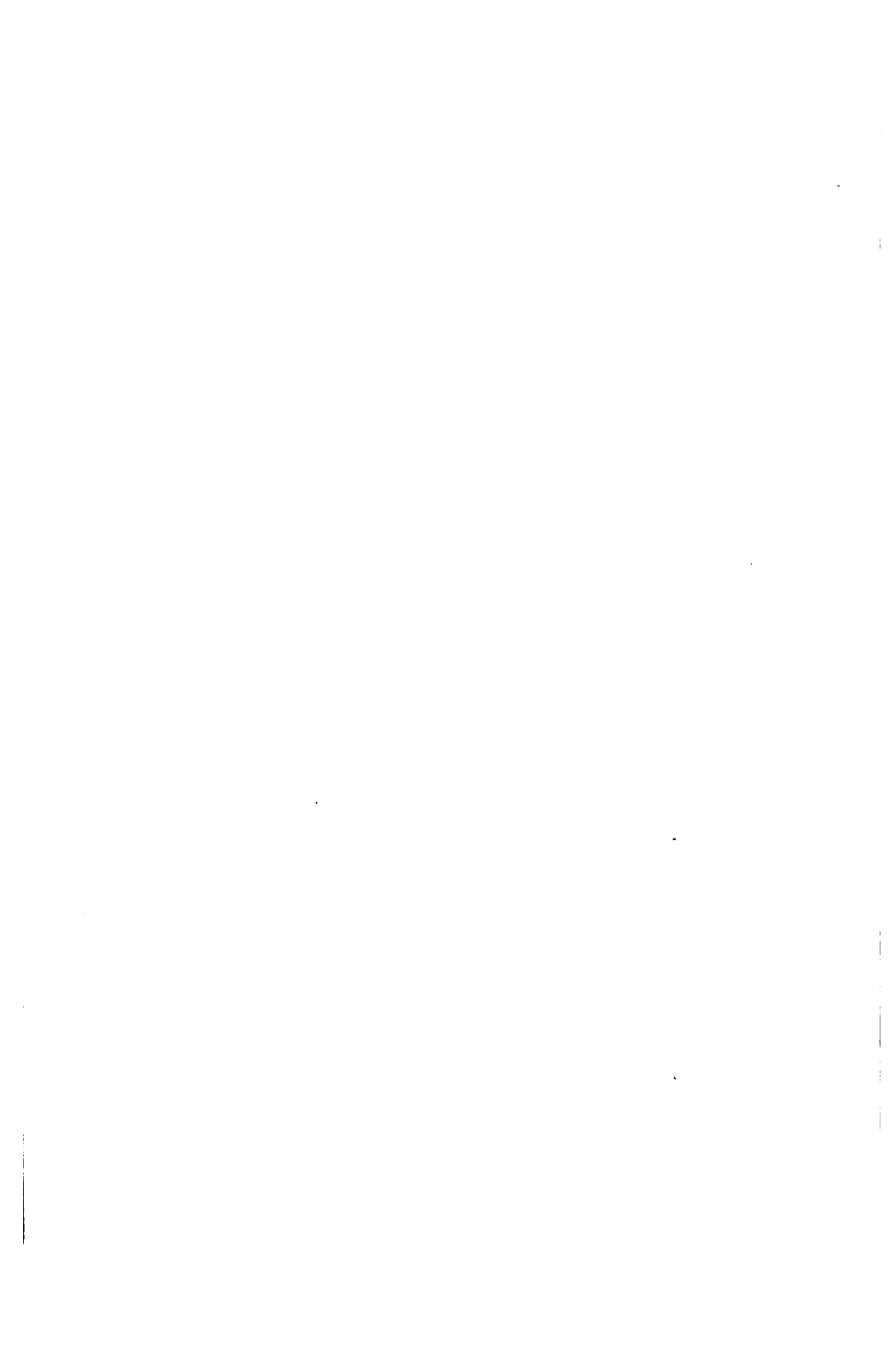
In 1853, while absent in Europe, he was nominated for Governor by the Whigs, without his knowledge, and served one year; but at the election of 1854 he was defeated in the irresistible sweep made by the Know Nothing party.

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of the College, with the consent of the Overseers, shall, in the exercise of their judgment, having regard to the exigencies, resources and best interests of the School, determine to discontinue the same."



**Emory Washburn**



Of his character as a lawyer, his intimate friend and legal associate, Hon. George F. Hoar, said(1) :

On the whole, the most successful of the Worcester Bar in my time in the practice of his profession, was Emory Washburn. He was a man of less intellectual power undoubtedly than either of his great contemporaries and antagonists, Allen, Merrick, or Thomas. Yet he probably won more cases year in and year out than either of them. He was a man of immense industry. . . . indefatigable in his service of his clients, often kept at work until one or two o'clock in the morning. His mind was like a steel spring, pressing in every part of the other side's case. No strength of evidence to the contrary, no current of decisions settling the law, would prevent Washburn from believing that his man was the victim of prejudice or persecution or injustice. But his sincerity, his courtesy of manner and his kindness of heart, made him very influential with juries, and it was rare that a jury sat in Worcester county that held not half a dozen of Washburn's clients among their number. I was once in a very complicated real estate case as Washburn's associate; Charles Allen and Mr. Bacon were on the other side. Mr. Bacon and I who were juniors, chatted about the case just before the trial. Mr. Bacon said, "Why, Hoar, Emory Washburn doesn't understand that case the least in the world." I said, "No, Mr. Bacon, he doesn't understand the case the least in the world. But you may depend upon it, he will make the jury misunderstand it just as he does," and he did. . . .

He was public spirited, wise, kind hearted, always ready to give his service without hope of reward or return, to any good cause.

He left no duty undone. Edward Everett Hale used to say, "If you want anything done, go to the busiest man in Worcester to do it—Emory Washburn."

. . . He was a thorough gentleman, thorough, courteous, well bred, and with an entirely sufficient sense of his own dignity. But he had little respect for any false notions of gentility, and had a habit of going straight at any difficulty himself.

Rev. A. P. Peabody said of him at the time of his death in 1878(2) :

There was in him a simplicity, a transparency of character, which won the universal respect of those who differed from him the most widely in opinion and policy. . . . He was thoroughly independent. . . . He was remarkable for his will and power to

(1) *Autobiography of Seventy Years*, by George F. Hoar, Vol. II.

(2) *Memoir of Emory Washburn*, by A. P. Peabody in *Mass. Hist. Soc. Proc.*, Vol. XVIII, (1879-80).

endure continuous labor. While at the Bar, his industry was almost beyond belief. His office was open to clients from the early morning to a late evening hour. . . . After his removal to Cambridge, he allowed himself, as advancing age demanded, a larger amount of repose and leisure; yet his working hours still exceeded those of almost any other man. . . .

In private life none that enjoyed his intimacy can need our testimony to his uniform courtesy, kindness, sympathy and thoughtful, generous care for whatever could conduce to their happiness and well being.

#### THE PARLIAMENT.

While the governing boards of the College were thus influenced by the political feelings engendered by the slavery question, it was not surprising that the politics of the day should have their effect on the students of the Law School. This was manifested in the Debating Society which had existed for some time among the students, known as the "Parliament". A similar society had existed for the discussion of topics of the day and the practice of Parliamentary Law in the early days of the School, but it had died out. When Luther S. Cushing, author of Cushing's Manual, was appointed Lecturer, interest in the subject revived; and the "Parliament" or "Assembly" was formed in 1849-50, described by Charles R. Codman (L. S. 1851-52) (1) :

The Assembly consisted of all the students, who elected a speaker and clerk for three months. I remember I succeeded James C. Carter as speaker. We discussed political questions. Resolutions on political subjects were presented. We were greatly interested in parliamentary law and practice, and points of order were very frequent, and the speaker was often put to his trumps. I have served in the Massachusetts Legislature for some years and I think that the presiding officers of that body had a much easier time than the speaker of the Law School Assembly.

The debates gradually centered about the slavery question, and they became so warm that it frequently seemed as if they would end in blows. In 1853, the society was actually broken up for a term by the difference between the Northern and the Southern students. Judge Charles E. Phelps (L. S. 1852-53) writes (2) :

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(1) See letter to the author (1907).

(2) See letter to the author (1907).



The most notable event in my time was the breaking up of the Parliament in 1853. This was really a rehearsal in miniature of the secession drama. There was no particular occasion for it. The country was then taking a rest from sectional agitation. The Compromise Measures of 1850 had been apparently accepted as a finality. The storm caused by the repeal of the Missouri Compromise did not burst until a year or two later. There was no practical question of sectional division then before Congress or the country.

The real significance of this phenomenon, or portent, as it might well be called, was this. It clearly showed that Northern and Southern men could not meet on the common ground of a debating society and discuss even an abstract question relating to slavery, without coming to a crisis, and a rupture. In effect, like the schisms in churches, and the breaking up of parties, it was one of the forerunners of Civil War.

I must admit that I was one of the seceders. I went to Cambridge decidedly pro-slavery in feeling, the result not of investigation or reflection, but of association and sympathy. In fact my feeling was such that I was mortified at not having had the good taste to be born South of Mason and Dixon's line. If anyone had at that time predicted that in less than ten years I would be found in a Northern army invading the South, at the head of a Maryland Union brigade, I should have considered him crazy.

The entire change in my point of view dates back to this secession movement at Cambridge. It was not sudden. It was the gradual and slow result of many heart to heart talks with extreme Southern students, avowed disunionists, especially fire-eaters from the cotton States.

In 1855, the Parliament was formally dissolved by the Law Faculty, owing to the action taken by the students on the adverse vote of the Overseers on Judge Loring's appointment. Loring had been extremely popular with his pupils, and they had keenly resented the treatment awarded him.

Accordingly a move was made in the Parliament, March 23, 1855, to pass resolutions on the subject. What followed is of peculiar interest as involving a pupil who later became one of the great Professors of the School—James B. Thayer(1):

The Southerners and their sympathizers in the Law School moved in their Parliament a vote of censure upon the Overseers. The motion was opposed on various parliamentary grounds, but finally the majority determined to put the vote through in disre-

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(1) James Barr Ames in *Proc. Amer. Acad. of Arts and Sciences*, Vol. XXXVII.

gard of orderly procedure, and the Clerk was directed to call the roll of yeas and nays. Mr. Thayer, who was Clerk, rose, and in a quiet but impressive manner declined to be a party to this unparliamentary action, resigned his office, and walked away from his desk. The motion was ultimately carried, but Mr. Thayer's calm, dignified rebuke of their proceedings robbed the victory of well-nigh all its glory even in the minds of the victors.

The resolutions, as finally passed, testified to the affection felt for Loring and to the students' disapproval of the Overseers; and were sent to the Boston newspapers, March 26 as follows:

Whereas the Corporation of Harvard University appointed the Hon. Edward G. Loring Lecturer in the Dane Law School, and the Overseers have arbitrarily refused to confirm the same, therefore be it

*Resolved* by us members of the Dane Law School in Assembly convened, that we fully concur in the opinion of the Corporation, as by their election expressed, that the personal worth, intellectual and legal abilities, and acquirements of Mr. Loring, eminently qualify him for the office of Lecturer.

*Resolved*, that Mr. Loring's system of instruction—comprising a clear analysis of Common Law principles and an exposition of their reasons and applications, enriched by copious illustrations from the Civil Law—was calculated to a rare degree to afford a knowledge of the topics discussed, at once broad and minute, and we deeply regret his removal as bringing a loss to ourselves and the science of law.

*Resolved*, that we regard the rejection of Mr. Loring as tending to restrain the freedom of judicial opinion, and as sanctioned neither by justice nor by wise policy.

The Boston Daily Advertiser said editorially:

We are informed that the passage of the resolutions was opposed by a decided and respectable minority, who objected to the imputations upon the Board of Overseers as indecorous, and who moreover thought the Assembly an inappropriate place for the consideration of resolutions which in their opinion should have emanated from a meeting of the law students called for the purpose. . . . We understand, however, that they received the votes of 56 members which was a majority of those attending the meeting.

We are gratified to learn that the feeling of regard for Judge Loring and of regret at the loss of his instructions, is universal among the law students, and that no objection to the passage of the resolutions sprung from the want of this feeling.

As a consequence of this action, however, the Law Faculty, al-

though undoubtedly sympathizing with the students' sentiments passed a vote, March 29, 1855, abolishing the Debating Club (1):

*Resolved* by the Faculty that any expression by the students of their respect and regard for Judge Loring, of their approval of his course of instruction and of their regret that his labors in the School had been terminated, if unaccompanied with terms of censure upon the action of the Board of Overseers would have met the entire approbation of the Faculty. But *resolved further*, that the passage and publication of the resolution which characterizes the proceedings of the Board of Overseers as arbitrary; more especially after the students had received publicly and privately the assurances of the members of the Faculty that reflections of that character would be deemed by the Faculty improper and inadmissible;—and the passage and publication of the resolution in which an opinion is expressed that the action of the Overseers is calculated to restrain the freedom of judicial opinion, and as sanctioned neither by justice nor by wise policy; constitute a breach of discipline and decorum, are disrespectful to the Faculty as well as to the Overseers, and demand the censure of the Faculty.

Whereupon it is ordered that the leave for the organization and meetings of the Debating Club or Assembly be recalled, and that the same be dissolved.

*Resolved* that the President be requested to communicate the foregoing Resolutions to the Board of Overseers.

Notwithstanding this vote, within six months another similar club was formed in September, 1855, called the "Assembly of the Dane Law School", which was approved by the Law Faculty.

This Club, though forbidden by its rules to debate the dangerous subject of slavery, became the centre of much heated discussion on this and allied topics during the following five years before the war. It was constituted like an ordinary legislative body and its rules and orders (as revised in January, 1858,) were as follows: Its officers, a Speaker and a Clerk, were chosen by ballot, each month. Meetings were held on Friday evenings up to ten o'clock. There were standing committees of three members each, to whom were referred the various measures appropriate to each, and from which elaborate reports were received: Ways and Means, Finance, Claims, Commerce, Public Lands, Post Offices and Roads, The Judiciary, Public Expenditures, Manufacturers, Agriculture, Indian Affairs, Military Affairs, Naval Affairs, Foreign Affairs, Internal Affairs, Territories, Dane Law

(1) See *Harvard College Archives, Reports to Overseers*. Vol. XI.

School, Roads and Canals, Patents, Public Buildings and Grounds, Rules and Orders.

At the meetings, at which spectators were allowed to be present, the following order of business was observed: 1. Reading of Journal. 2. Election of officers. 3. Receipt of petitions. 4. Reports of Committees. 5. Resolutions and Motions from members generally. 6. Orders of the day.

The one forbidden topic was thus provided against:

7. It shall be the duty of the speaker and of the chairman of the committee of the whole to rule out of order any resolution, petition, report, bill, motion, debate, or remarks involving directly or indirectly the subject of American slavery; and his ruling shall be final and without appeal. It shall be his duty to rule out of order all motions, resolutions, or bills, partaking of an indelicate, trifling, or improper character. This decision shall be subject to be revised on an appeal seconded by three members of the Assembly. The speaker shall use his discretion and authority in suppressing levity, disorder, and discord and in promoting order, interest, and dignity.

Reference to this Club was made in the report of the Professors, Dec. 28, 1859, as follows:

Clubs for discussion and debate are instituted by the students with the approbation and encouragement of the Faculty. The general club for practice in Parliamentary Law excites particular interest.

The interest in politics was not confined to the students—for Professor Parker, who had already taken an interest in public affairs now began to appear prominently on the political platform and in the press; and Professor Parsons also took an active interest in political matters. As an example of the attitude of the Professors, the following letter from John C. Douglass (L. S. 1855-57) is notable(1):

In the summer of 1856 the political excitement that grew out of the enactment by Congress of the Kansas-Nebraska bill, and culminated in the Border war in Kansas, entered even to the very conservative people of Cambridge and Harvard University. The Professors of the College and Law School, with Professor Felton at their head, were among the most enthusiastic supporters of the Free State Party. They made speeches, and spent their money liberally in the work. I at once enlisted in the cause, and was so

(1) See letter to author (1907).

encouraged in it by the Professors, that when I proposed to go to the front in Kansas, the Faculty immediately said to me, "Yes, go, and we will take care of you here, and will graduate you with your class, the same as if you were here, and in due time we will send your diploma to you." This promise was kept, and the document was forwarded to me in the summer of 1857, when my class graduated. This act shows how the big hearts of these dignified and conservative Professors and learned judges respond to freedom's call.

When the news came of the assault of Brooks upon Sumner in the United States Senate, May 22, 1856, a public indignation meeting was held in Cambridge on June 2, at which both Professors Parker and Parsons spoke, together with Judge Willard Phillips, Jared Sparks, President Felton, Longfellow, Dana and others. In his vigorous speech Parker said:

The felon blow which struck down the citizen and the senator, prostrated at the same time the privileges of the Senate and the freedom of debate guaranteed by the Constitution of the United States—the last of a series of outrages—which have made the capitol little better than a den of wild beasts. . . . For myself personally I am perhaps known to most of you as a peaceable citizen, reasonably conservative, devotedly attached to the Constitution, and much too far advanced in life for gasconade; but under present circumstances, I may be pardoned for saying that some of my father's blood was shed on Bunker Hill, at the commencement of one revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another.

These were fiery words for a man of sixty-one years of age. An account of this speech in the *Edinburgh Review*, October, 1856, says:

The most remarkable of all the speeches, which for earnestness and solemnity of denunciation has not been anywhere surpassed—a model of temperance in the utterance of righteous indignation and a most pregnant sign of the times in America. . . . Deeply indeed must the independent spirit of New England have been stirred, when such words can be wrung from such a man in such a place. The violence of the South, significant as it is, is much less significant than the slow intense wrath of the North.

As the autumn of 1856 approached, it became evident that the old Whig party was dead. A few of the leaders, like Robert C. Winthrop, and George S. Hillard, clung to the shattered frag-

ment of the old political organization, and joined in nominating Millard Fillmore, as the "American" candidate for the Presidency; but the movement was practically a farce. Some strong Whigs, like Rufus Choate and many of the Webster Whigs, who regarded the new Republican party as a "sectional", "geographical" party, which was bound to dissolve the Union, joined the Democrats in voting for Buchanan, as a choice of evils.<sup>(1)</sup>

The Republicans nominated John C. Fremont. Such being the confused political condition, Judge Parker, being strongly in favor of the Republican party, felt that he could not remain quiet; and accordingly, on October 1, 1856, he delivered an elaborate address to the citizens of Cambridge on *The True Issue and the duty of the Whigs*, which gives an interesting picture of his political views. In it he stated that he came before them "as a citizen of Cambridge, a constitutional lawyer, if you please, and especially as a Whig, as one who has been a Whig since the formation of the Whig party—a conservative Whig, a National Whig." As to the Fugitive Slave Act, he said that:

It could not have had my vote, because there is no provision in it securing a trial to the fugitive on his rendition and return, and there are obnoxious sections which serve only to exasperate the citizens of the non-slave holding States and seem almost designed for purposes of insult. But believing it to be, however unwise, a constitutional enactment, in my public teachings and private discourse I have maintained the constitutionality of that law, and stopped a religious newspaper, conducted with great ability, on account of my disapproval of the encouragement it gave to a forcible resistance to the execution of that law.

He considered the platforms of the various parties in detail, and pointing out the inconsistencies and futilities of the Whig nomination of Fillmore, declined to follow his former friends in so useless a course, saying:

I may be old, but I am no foggy. If there is to be a great political battle in which the slave power assuming the name of Democ-

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<sup>(1)</sup> Choate wrote to the Maine Whig State Central Committee, August 9, 1856:

"The question for each and every one of us is just this—by what vote can I do most to prevent the madness of the times from working its maddest act—the very ecstasy of its madness—the permanent formation and the actual present triumph of a party which knows one-half of America only to hate and dread it—from whose unconsecrated and revolutionary banner fifteen stars are erased or have fallen—a party founded on geographical principles endangers the Union."

racy, is arrayed against the personal liberty of one class of the people, and against the equal political rights of another class, I wish to enroll myself in the ranks and do a yeoman's service. I cannot be brought into the field in the heat of battle under any teachers—to shoot at a mark. . . . The real issue in the campaign is between the Democratic and the Republican parties—the extension or non-extension of slavery.

Although Parker was careful to disclaim speaking for the Law Department or the College, or as the Royall Professor, he was vigorously attacked for this speech, at a meeting in Faneuil Hall two weeks later, Oct. 16, by Robert C. Winthrop, who spoke of,

That learned head of the neighboring Law School who has felt called upon within a few weeks to quit his official chair and compromise the neutrality of his position. . . . and ridicule the position of Mr. Winthrop and Mr. Hillard at the late Whig Convention. I shall not follow his example further than to say, that I would be greatly relieved as a friend to the University and the Law School, if I could have as clear a perception of the propriety of his course as I have of that of my friend Mr. Hillard, or even of my own.

To this Judge Parker replied, pungently, although somewhat inconsistently, by quoting the provisions of the Revised Statutes of Massachusetts, Chapter 23, Section 7, regarding the duties of the Professors at Harvard:

To impress on the minds of children and youth committed to their care and instruction the principles of piety, justice and a sacred regard to truth, love to their country, humanity and universal benevolence, sobriety, industry, and frugality, chastity, moderation, and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded . . . and to lead their pupils . . . into a clear understanding of the tendency of the above mentioned virtues to preserve and perfect a republican constitution and secure the blessings of liberty. . . .

He further retorted, by asking, where was the impropriety "in attempts to disseminate a knowledge of the true principles of the Constitution"; and closed by saying, "I was not before aware of the fact that upon great questions of morals and politics, involving possibly the very existence of a free government, I hold any 'neutral' position."

This episode has been described at some length, because it is

so characteristic of the man, of his sturdy pugnacity, and his decided and uncompromising views of the right. His course did not, however, increase his popularity with the controlling powers at Harvard or in the Law School, where the Southerners, the Democracy, and the conservative Whigs were still the controlling force and the Republicans and Abolitionists, while vigorous in speech and in debate, comparatively scanty in numbers. The Corporation was strongly Whig, and the Board of Overseers was composed of discordant elements—a number of the Know Nothing party, several pronounced Abolitionists, Republicans, Whigs, and a few Democrats.

An incident during these ante-bellum days is related in his *Memoir of Parker*, by George S. Hale (L. S. 1845-46), which throws light on the conditions.<sup>(1)</sup> It is stated that "one day, in a lecture on Constitutional Law, Parker referred to the expulsion of Hon. Samuel Hoar of Massachusetts from Charleston, saying that between independent States, it would have afforded cause for a declaration of war. Thereupon many Southern students hissed vigorously. The Northern students answered by applause. Parker, hurt and indignant, demanded apologies which were finally given, and the episode ended. There were frequent outbreaks, however, of a similar kind."

In this year of political excitement, 1856, an event of great local importance to Cambridge took place in the opening for public travel of the first street railway chartered in Massachusetts, the Cambridge Street Railway Company, (incorporated in 1853). This event was dolefully foreshadowed in an article published in the under-graduates' *Harvard Magazine* (Vol. I), on *The Omnibus* describing,

The melancholy prediction that in the course of a few short years the railroad car will oust the omnibus from Main Street, and no more at nine of a Saturday morning will Jehu's "Ready for Boston" gladden the ears of homesick freshmen. Dreadful to tell, the prophecy is near fulfilment the wicked have triumphed and the iron abomination is already past the bridge.

The opening was thus described in the *Boston Transcript* March 27, 1856:

Cambridge Horse Railroad—Five trips were made on the

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(1) See *American Law Review*, Vol. X.



road yesterday, to the perfect satisfaction of a throng of passengers. It was demonstrated that two horses tandem made the trip with a car containing forty passengers with more ease than they could have drawn an empty omnibus on the street. A special trip for the observation of a number of gentlemen was made early this afternoon. The cars will continue running regularly next week, and the tracks will be completed the whole distance between the Revere House and the Brattle House during the month of April. This is the first horse railroad for passengers in New England, and the first one is that between Schenectady and Saratoga Springs, which was built about twenty-three years ago.

The cars of those days were small, sixteen feet in length, seating twenty passengers. The fare was ten cents between Harvard Square and Bowdoin Square; and the running time was thirty minutes. In March, 1857, the *Harvard Magazine* contained an article on the *Horse Railroad*, expressing the welcome given to the new mode of conveyance:

"Ready for Boston," cried the conductor one Saturday morning. The two Freshmen with their Sunday beavers and the Proctor with a carpet bag who were passing Wood and Hall's, started upon the run. The Law Student on Wiley's steps threw away his cigar and drew on his kid gloves. The bell sounded and we were off. . . . The timid Freshman who has obtained leave of the Proctor to be present at a dramatic performance in company with his parents! the Sophomore, who has been treading the boards as a utility man; and the potent, grave and reverend Senior who has been transformed for the nonce into a butterfly of fashion, . . . instead of wasting their patrimony in stable bills or testing their pedestrian abilities, can quietly walk to the station, seat themselves luxuriously in the corner of the vehicle awaiting them, and after a half hour's nap awake in Cambridge, and go to their rest, blessing the inventor of this model conveyance.

A more pessimistic view of the effect of the new means of conveyance is to be found, five years later, in President Felton's Annual Report for 1862-63:

The passage of horse cars to and from Boston, nearly if not quite a hundred times a day, has rendered it practically impossible for the Government of the College to prevent our young men from being exposed to all the temptations of the city.

The year 1857 was made memorable in the history of law by

the decision of the United States Supreme Court, on March 6, of the case of *Sandford v. Dred Scott*—of which the *Springfield Republican* wrote editorially and prophetically, on March 11, "The history of judicial decisions in this country contains nothing so important as this. . . . The people are the court of last resort in this country. They will discuss and review the action of the Supreme Court and if it presents itself in a practical question will vote against it."

Lowell, writing to Charles Eliot Norton in Italy, March 21, said:

Of course you have heard of the Dred Scott decision. I think it will do good. It makes slavery so far as the Supreme Court can, national—so now the lists are open, and we shall soon find where the tougher lance shafts are grown, North or South. Don't fail to read Justice Curtis' opinion if you see it. It does him great honor and will rank hereafter among the classics of jurisprudence.

To the Law School, the year was of further interest, on account of the famous Dalton divorce case tried in the Massachusetts Supreme Court before Judge Pliny Merrick, at which the law students attended in great numbers to listen to the arguments of Choate and Henry F. Durant, against Richard H. Dana.

At the end of the year, the Law School received a visit from Col. John C. Fremont, the recent Republican candidate for President, described by one of the students in a letter to the *Boston Post*, Dec. 7, 1857, as follows:

At eleven o'clock, A. M., the eyes of an hundred and twenty men, all members of the Law School of Cambridge, were opened wide, either with curiosity or pride, (some said) to look upon a man whose near approach to the White House made for him such notoriety, and not a little frightened a large portion of the United States. He was shown into the law library and here introduced by Judge Parker, in something like this way:—

"Gentlemen of the Law School, I have the pleasure of introducing to you Col. Fremont, whose name is familiar to you all. (Here there was considerable applause.) Col. Fremont is on a visit to this part of the country upon business of a private nature, and has thus honored us with a visit, prompted by a curiosity which you've seen evinced by many before, and therefore does not appear before you as a public man, or to address you." (Applause.)

Judge Parker stepped aside, and the hero of the Rocky Moun-

tains stood face to face with that august assembly the *law students*. He slightly inclined his head, which could neither be called a bow nor anything that was not a bow; it was enough, however, to bring down the house, which seemed to embarrass him no little, for he evidently showed a desire to speak, and seemed to be aware that to say something was almost necessary. Whether a look from "Jessie," (who accompanied him with several other ladies) or another round of applause which here followed, made him "get down to his work," I can't say; at any rate, he commenced thus, as well as I can recollect:—

"It is with great pleasure that I visit Cambridge, whose historical recollections afford me even more gratification and pleasure than I derived from looking at Bunker Hill or any other places of interest by which I am now surrounded"—there the gentlemen stopped and repeated the first part of what he had said, and then suddenly becoming aware of what he had done, stopped short, and looked down with a very confused laugh. This tickled his lady as much as it surprised some, and made others whisper behind their hats. A few moments elapsed, and perhaps another look from an eye he was accustomed to, made him think it was necessary to finish his half finished but twice repeated sentence, and he resumed—"I was about to say, gentlemen, that I have experienced great pleasure in visiting you and associating the historical recollections of Cambridge with its present"—(*Great applause*) very much to the relief of the noble hero, who again slightly inclined his head and stepped down among his very enthusiastic admirers, who shook his hands and smiled their thanks for the best speech that Dane Building ever had made within its walls. While the applause from students continued, he was seen to speak apart with Professor Parsons, and soon after, that gentleman arose, and the house was stilled with the power of that great respect and love which our truly noble Professor has at all times been capable of commanding. He said:

"Col. Fremont has done me the honor, gentlemen, (*I consider it an honor*) to request me to account to you for his being stopped in his remarks to you. We can easily pardon him for this arrest in what he had to say to you when we consider the cause which he has been pleased to assign himself as giving him pleasure, and honored us by calling the historical and pleasant recollections connected with the history of Cambridge; and we can the more easily overlook this stoppage when *we all know that he never has yet stopped when he had anything to do!*"

This was spoken in that easy, dignified, fluent and polite way which is peculiar to the learned gentleman, and was followed by great applause, and the lower bow of the great colonel, who this time accompanied it with a very sweet smile, which seemed to say "I wish I could talk that way." He was then cheered out of the room, and our Professor was received by his class at 11½ o'clock with peals of applause for his gallant aid to the dis-

tinguished stranger, which no doubt will be remembered with the liveliest emotions of gratitude and pleasure by Col. Fremont long after his attempt at power shall by the world have been forgotten.

In 1858, Harvard students shared with all the citizens of Cambridge in the celebration of the abolition of tolls on West Boston Bridge, thus noted by Longfellow in his diary :

Feb. 1, 1858, Cannon and Bells at sunrise, announcing that henceforth the Cambridge toll bridge is free. At noon more bells and a procession of 40 or 50 railroad cars with banners and music and a speech on the bridge and surrender thereof to the city of Cambridge.

An entry in this same diary, six months later, is of interest :

Aug. 5, 1858. Standing in the office I hear the click, click of the telegraph and presently the clerk says, "The Atlantic Telegraph is laid !" Soon it buzzes through the corridors, and the whole house is alive with the news.

Aug. 6. Go to town with the boys. Flags flying and bells ringing to celebrate the laying of the telegraph.

In the next year, 1859, occurred the death of Rufus Choate on July 13. So large a part had this wonderful lawyer and orator played in the lives of the law students, so many of his cases had been attended by them for practice in cross examination, through listening to his wonderful feats, that it was thought fitting that an address should be delivered in his commemoration ; accordingly Professor Parsons, on invitation of the Assembly of the Law School, delivered an oration on September 29, 1859. His description of Choate was so vivid that at the request of the Assembly, the address was published, and remains today one of the best of all the contemporaneous accounts.

The Assembly listened this year to two other notable addresses ; one by William Emile Doster, of Pennsylvania, a member of the Senior Class of the Law School, delivered on March 18, 1859, on *The Conflict Between Literature and Law*(1) ; the other, at the opening of the Fall Term in September, 1859, by Hon. Joseph C. Jackson of Newark, New Jersey, on *The Relation of the American Lawyer to the State*,(2) in which he lamented the

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(1) This address was published at the request of the law students.

(2) This speech was published at the request of the law students.



Dane Hall Lecture Room



apathy of merchant and lawyer towards public service, the bribery in every grade of public office, and the enormous abuse of wealth and patronage. A hint at the troublous political times was given in his opening:

Tonight we meet to acquaint ourselves with one another, that we may be at peace, may recognize each other as followers of the same pursuit, encountering the same difficulties, animated by kindred aspirations.

The changes in the Law Faculty and the approach of the panic of 1857(1) had a marked effect upon the attendance at the School, which dropped from 148 at the beginning of 1853-54, and 143 in 1854-55, to 111 in 1855-56 and 109 in 1856-57, while the average number in attendance during these years dropped from 148 to 115. Nevertheless, the Report, Jan. 19, 1856, of the Law School Visiting Committee, of which Charles Theodore Russell was Chairman, spoke of the "continuance of the same general prosperity of the School", and of its widely diffused influences:

It cannot but be that this early intermingling of those who are hereafter to fill important and leading positions on the bench and at the bar of the several States, will exercise a beneficent influence in the harmonious working and perpetuity of the institutions we all love and cherish.

President Walker, in his Report for 1855-56 noted that the School was "resorted to by students from every section and from almost every college in the United States."

The attendance in 1857-58 was 126, in 1858-59, 111, but re-

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(1) George Ticknor wrote to Sir Edmund Head, Nov. 18, 1857:

"I need not tell you what a hurricane we have had in our own commercial and monetary affairs. Even London and Paris have not been unconscious of it. But here it has been tremendous. A great deal has, no doubt been owing to a mad panic. But there have been deep causes at work for years to produce it. The people of this country have been spendthrifts to a degree that, I think, no people in all its classes ever were before; and as for the great merchants and manufacturers, the bank directors and railroad managers, they have been gamblers. . . . We shall of course get over it, and, I suppose, take nothing by our experience. The country was never more really prosperous—never richer in all that goes to makes up national wealth than it is now—and as soon as this bourrasque is over, we shall go to spending, speculating and gambling, just as if nothing had ever happened. One of the most curious things about it—is the way in which people accept it and submit to it, as if it were the work of an irresistible fate. Debtors *claim*, as if it were a right, an extension of time for paying their notes, and creditors everywhere grant it as a matter of course.

See *Life and Letters of George Ticknor*, Vol. II.

vived again in 1859-60 to 166, the latter being the largest number ever in attendance at the beginning of a College year since 1817. The average attendance also increased in these years from 143 to 161, and the Law School Visiting Committee, January 26, 1859, reported the School as "highly prosperous".

A warning note, however, as to the approaching Civil War was sounded, in President Felton's 35th Annual Report (1859-60):

Law School students have pursued their studies with exemplary diligence and while the discords of the country have been increasing, they have lived in uninterrupted harmony, drawn from 29 States.

The course of instruction was as follows in 1855-56: Parker gave lectures upon Bailments, Constitutional Law and the Jurisprudence of the United States, Equity Jurisprudence, Pleading, Evidence, and Practice.

Parsons gave lectures upon Blackstone, Insurance, Bills and Notes, and Partnership.

Washburn gave lectures upon Domestic Relations, Conflict of Laws, Sales, and Real Property.

In 1856-57 Parker gave Agency, Constitutional Law, Pleading and Practice, and Equity Jurisprudence.

Parsons gave Blackstone, Insurance, Evidence, and Contracts.

Washburn gave Domestic Relations, Criminal Law, Bankruptcy and Insolvency, and Real Property.

And this rotation of courses every two years was substantially followed up to 1870. Ten lectures were given each week, and "in the course of such lectures such examinations are made by inquiry of the students as to points and cases presented to them in relation to the subject matter of the lecture as is thought best. We repeat that larger experience has more firmly convinced the Faculty that no other mode of examination would be so well adopted to the wants of the School." (1)

Recitations by the students had now been entirely given up, (2). The number of Moot Courts was now reduced to one a week; and as the Professors reported (3):

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(1) See President's Annual Report (1854-55).

(2) See Report of Law School Visiting Committee, Jan. 26, 1859.

(3) Professor Joel Parker in his *Law School of Harvard College* (1871), said: "Being deeply impressed with the value of Moot Courts as a means of instruction, I proposed, at the first term of the new administration to



In 1848, we ventured upon the experiment of holding two Moot Courts in a week and for some years it was very successful. For a few terms past perhaps partly from the introduction of prizes for disputation, the interest in the Moot Courts has decreased and during the last term attendance upon this part of the exercises was very small.

The need of a new building was now very greatly felt, and in 1856 Professor Parsons wrote to President Walker(1) :

The Law School building is anything but fireproof and I suggest the query whether it would not be well to have a small safe there.

Formerly, the Professors did most of their work and kept their papers at home. We work more at the School. I am there the whole of every forenoon, and much of the afternoon. My notes for all my lectures are kept in my room. Judge Parker is less in his room than I am, having some occupation which draws him elsewhere, but he is there much of the time and keeps valuable papers there. Professor Washburn has begun to keep in his office, much as I do.

At the close of the year 1859, the Law School received, for the first time in its history, a legal name, and was thenceforth officially recognized by its present title, under the following vote of the Corporation, October 29, 1859(2) :

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double the number so as to hold two each week, which was assented to, and that course adopted as a Faculty regulation. The plan worked well for a time—the students were eager to take their turns as counsel and prepared their cases with great zeal. But in the course of a few years, a change came over the spirit of the dreams of their successors, the interest flagged, and then came a term at which it was difficult to find students who were entitled to act as counsel and who were willing to be retained, and I yielded very reluctantly to a proposition to change the rule. The School changed afterwards, but I could not procure its restoration.”

(1) *Harv. Coll. Papers*, 2nd Series, Vol. XXIII—Letter of Parsons, Oct. 26, 1856.

(2) See letter of the Law Faculty to the Corporation, June 25, 1859—*Harvard Coll. Papers*, 2nd Series, Vol. XXVI.

“The Professors in the Law School ask leave to call the attention of the Corporation to a usage which seems to be increasing by which the school is designated as the Dane Law School. So far as they are aware, Mr. Dane had no agency in founding the School. His name is affixed to the Professorship which he partially endowed and to the building occupied by the school in the erection of which he rendered some aid. This seems to be a sufficient acknowledgment for his donations.

They therefore ask the Corporation to affix a name to the School by which it shall hereafter be known by authority, and they suggest for consideration and selection the names of The Harvard Law School, the Law School of Harvard College, and the Law School of the University at Cambridge, which last is the designation in its catalogues for the last 12 years.”

The Memorial from the Professors of the Law School requesting "the Corporation to affix a name to the School by which it shall hereafter be known"—was again taken up. The President submitted a Report giving the facts in the case from the Records of the College, from which it would appear that no legal name or designation has yet been given to the School; and the same was ordered to be placed on file.

Whereupon it was *Voted* that the Law School shall bear the name of "The Law School of Harvard College" until otherwise ordered by the proper authorities.

And a year later, the School was still further recognized as a separate department by vote of the Corporation, July 28, 1860:

*Ordered* that the Law Faculty have the care and charge of Dane Hall with the Library and its appurtenances; that they may from time to time appoint and remove a janitor and assistant janitor and may make such rules, regulations and orders for the protection and preservation of the building and property as shall appear to be expedient subject to the approval of this Board.

#### THE BRATTLE HOUSE EXPERIMENT.

During the years 1857-1860 the Law School tried an experiment which proved to be most disastrous to its financial condition, and which undoubtedly retarded its development and influence for the ensuing fifteen years.

In January and in November, 1856, the Law School Visiting Committee had been much impressed with the expenses attendant on a residence in Cambridge, and queried whether these could not be lessened so as not to debar students with limited means "from the wholesome influences and superior instruction here furnished." The College Commons had at this time been abolished, and students were obliged to seek board in public or private boarding houses. "Rents are high and every dozen of students has to maintain a family. This has continued so long and is so notorious that Cambridge is practically a place for the rich and not for the poor."—And the Committee suggested that the Corporation afford a building or the basement of University Hall where cheap rooms for Club boarding places, or cheap meals might be obtained.

If the Corporation can devise means to lessen these expenses or to assist students in their endeavor to live economically, the

number of students and the utility of the whole College in all its departments would, we are very sure, be very greatly increased.(1)

The Law Professors were actively interested in this suggestion, and Professor Parsons conceived the idea that a building located on Brattle Square, then used for a hotel and called the Brattle House, should be purchased and used for a lodging and boarding house for students in the Graduate Schools. With his characteristic impulsive zeal, he urged this purchase upon the Corporation, who were rather disinclined to adopt the plan. It appeared that the house and land had cost its owners in 1850 about \$47,500, and that it could probably be purchased for slightly over \$20,000. Parsons evolved an elaborate scheme (with a detailed estimate of expense) for the transformation of this hotel for College purposes.(2) He planned for 67 bedrooms, renting for \$3,320 per year; meals, he figured, could be supplied to the poor student, at 27 cents a day, or \$1.89 a week, and that 50 men could be supplied with food and lodging for at least \$2.50 a week. "Of this I have no doubt whatever, nor of the rapid and important influence of it on the School." At the same time, he saw the difficulties in the project, and was disinclined to have the Law School undertake the burden. The College Treasurer, William T. Andrews, however, was deeply impressed with its possible advantages, and urged Parsons to continue his efforts, in which advice President Walker concurred. The Corporation, however, was opposed, being decidedly sceptical of success. Finally Parsons' enthusiasm and optimistic figures had their effect; and on

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(1) March 11, 1857, the Overseers appointed E. Rockwood Hoar, J. M. Churchill and L. N. Tayer, a Committee, "to consider what means if any may be adopted to reduce the expenses incident to a residence at Cambridge. . . ."

This Committee presented an elaborate report Jan. 28, 1858, full of interest. They stated that the average expense of board and room rent was greater at Harvard than at other colleges, and "somewhat more than twice as great as it was 25 years ago. The general price of food and houses in the neighborhood of Boston has greatly advanced. There has been a general change of habits in the community. The style of living has grown less simple and more luxurious and expensive, in furniture, dress and food. The supply of college rooms is entirely inadequate for the 400 students. 30 years ago it was not sufficient for the 200 then in College. The great want of the College seems to be buildings for dormitories, with a place in the basement for board."

(2) See estimate of Parsons in a Memorandum by A. Willard, March 20, 1857; letter of Parsons to Walker, June 1, 1857, *Harv. Coll. Papers*, 2nd Series, Vol. XXIV.

April 18, 1857, the Corporation authorized the purchase of the Brattle House, "as an investment of the funds of the Law School"—first, however, taking the precaution to commit the whole Law Faculty in writing to the recommendation and support of the project.(1)

The arrangement was embodied in a letter to the President and Treasurer, April 21, 1857, under which it appeared that the funds of the School were to be used in the purchase but the net receipts of rentals were to be credited as income from the amount paid; and the Law Faculty was to take upon itself the whole charge and management of Brattle House. The right to have its students room in Graduate Hall or Divinity Hall, as had been the custom, was to be relinquished by the Law School.

The Professors embarked in this new enterprise with enthusiasm, which was quickly dulled by the discovery that far more costly repairs and alterations were needed than had been anticipated. Within three years, upwards of \$35,000 of the Law School funds had been sunk in the venture. Troubles ensued with the caterer. It was found that fewer students than had been hoped could be induced to occupy the cheap rooms. The Professors had not the time to give attention to the numerous

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(1) "April 18, 1857. To W. T. Andrews, Treas.

The undersigned Professors of the Law School beg leave respectfully to say (so far as they may without the slightest interference with the exclusive duties of the Treasurer) that they have carefully inquired into and considered the facts in relation to the Brattle House, and are of the opinion that a purchase thereof at the present price by the friends of the Law School, with such aid as may be obtained from the Scientific School, would be decidedly advantageous and useful to the Law School; and therefore, but always with the reservation above made, express their desire that this purchase may be made.

Joel Parker  
Theophilus Parsons  
Emory Washburn."

Professor Parker in his *The Law School of Harvard College* (1871) said:

"The scheme to purchase the Brattle House did not originate with me, nor did I make any calculations, by which it was supposed to be shown that it would not entail any loss upon the School, but would furnish an income nor was I present when it was finally determined to make the purchase. But the attempt to lessen the expenses had my hearty support—the purchase, my approval, on the representations which were made; my aid, such as it might be, was given to render it a success, and I do not shrink from my share of responsibility for the measure and its effects. The arrangement failed partly from the fact that no person eminently qualified could be found to manage the concern, and partly because the partial measure of success which attended it, by reducing the rates charged elsewhere, tended of itself, to pecuniary loss."

details, nor the business ability to conduct the establishment economically.

Finally, on April 27, 1860, the Law Faculty wrote to the Corporation<sup>(1)</sup> saying that "the experiment has been attended with a measure of success, the other departments of the College sharing in the benefits of it. But experience has rendered it quite evident that such an establishment cannot be managed by the Law Faculty with the same economy that it might be if it were more directly under the supervision and control of the Treasurer and other officers who have charge of the prudential concerns of the College"; and they asked that the College should purchase the building out of the general funds.

The Corporation declined to accede to this, in a vote of July 28, 1860, both the new President Cornelius C. Felton, (who had been chosen Jan. 20, 1860) and the new Treasurer Amos A. Lawrence, (appointed in 1857) being opposed.

Another attempt was made by Parsons to persuade the Corporation to purchase, in a letter of September 29, 1860, in which he said:

With all the losses and hindrances arising from the inability of the Law Faculty to attend to such a matter in all its details in the right way, it has come *near* paying fair interest to the Law School on its cost, and has shown, I think, that with proper management it might do this. Of its indirect benefit to the College and all its Schools in Cambridge, far more might be said than I care to say now. I will suggest this, however.

Nobody in Cambridge doubts that the Brattle House has brought down, or has kept down, the price of rooms at least 10 cents a week for each student residing here; and as much more for the board of each student. I have never heard anyone put it so low as this. That would be twenty cents a week for each student—call it *half* this—for 600 students—and this indirect benefit is of itself full compensation for all the cost of the house and furniture.

There are many such considerations which must occur to you or to Mr. Lawrence, and I will not dwell on them; as, the advantage of your House under College Control for the reception of strangers who visit Cambridge in reference to the College, the certainty of what the House will become if it passes out of College control.

The matter was finally settled by a vote of the Corporation, September 29, 1860, purchasing the property for \$15,000, and

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(1) See *Harv. Coll. Papers*, 2nd Series, Vol. XXVII.

on March 16, 1861, the Law Faculty addressed the following letter to the Corporation, thus closing the incident:

The undersigned Professors in the Law School, being fully convinced that the Brattle House if retained should be under the superintendence of the Treasurer, hereby in behalf of this department accept the offer of the Corporation to take it at the sum of \$15,000.(1)

The loss to the Law School on this transaction was about \$17,000, changing its account from a balance of \$16,462.43 in 1856 to a deficit in 1861 of \$2,531.94(1).

(1) It would seem that considerable friction had arisen over this sale. See the following extracts from letters from Amos A. Lawrence, Treasurer, to President Felton, March 16, and March 20, 1861, *Harv. Coll. Papers*, 2d Series, Vol. XXVIII.

"If the gentlemen of the Law School should refuse to expel the tenant Kent, it may be necessary for the Corporation to take charge of the Brattle House. But it is desirable that they should keep the charge of it and make the sale of it when it is made, and so keep the responsibility of the failure of the scheme upon themselves. To induce them to do as we wish, it may be necessary to inform them in detail of what has been done there, and as to the character of these people. If they insist on keeping the house, I shall deduct from the Law School share of the Bussey Fund all that is necessary, to prevent the increase of indebtedness from the Law School to the College. This will hasten their decision to sell the Brattle House, if they are still doubting as to that. . . . The arrangement proposed is the best which the gentlemen of the Law School can make, speaking financially. Whether it is expedient for the College to retain the ownership remains to be seen. Probably not."

(2) See detailed figures, Chapter XL, *infra*.

## CHAPTER XXXIV.

### THE FEDERAL BAR AND LAW 1830-1860.

The Federal Bar in the thirty years 1830-1860, showed a marked change from that of the first thirty years of the 19th Century. (1) Daniel Webster continued, until his death in 1853, the undisputed head; but the lawyers of Maryland, Pennsylvania and Virginia no longer monopolized the arguments. Massachusetts was brilliantly represented by noted lawyers like Franklin Dexter, Charles G. Loring, Sidney Bartlett, Caleb Cushing (2), John H. Clifford, (3) B. F. Hallett, (4) John Davis, (5) James T. Austin, (6) Richard Fletcher, (7) and Willard Phillips. In 1840, Theophilus Parsons, Jr., argued *Peters v. Warren Ins. Co.* (14 Peters 99) against Webster. In 1842, Richard H. Dana, Jr. (8) argued the famous case of *Swift v. Tyson* (16 Peters 1); and in the same year Rufus Choate (9) made his first appearance in

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(1) Between 1830 and 1860 only nine new States were admitted into the Union in addition to the 23 composing the United States in 1830.

*Arkansas* was admitted in 1836. Its first law reports were Albert Pike's in 1840.

*Michigan* was admitted in 1837. Its first law reports were Douglas' in 1852.

*Florida* was admitted in 1845. Its first law reports were in 1847.

*Texas* was admitted in 1845. Its first law reports were in 1848.

*Iowa* was admitted in 1846. Its first law reports were in 1846 covering territorial court decisions, in 1849 covering State Court decisions.

*Wisconsin* was admitted in 1848. Its first law reports were Chandler's in 1850.

*California* was admitted in 1850. Its first law reports were in 1851.

*Minnesota* was admitted in 1858. Its first law reports were in 1858.

*Oregon* was admitted in 1859. Its first law reports were in 1862.

(2) Born in 1800, a Harvard graduate of 1817, Judge of Mass. Supreme Court 1852, Atty. Gen. of the United States 1853-57.

(3) Born in 1809, Brown 1827, Atty. Gen. of Mass. 1849-53, Governor 1853, Atty. Gen. 1854-58.

(4) Born in 1797, Brown 1810, U. S. Dist. Atty. 1853.

(5) Born in 1787, Yale 1812; Governor 1835-1841; U. S. Senator 1845-53.

(6) Born in 1789, Harvard 1802, son-in-law of Elbridge Gerry, Atty. Gen. of Mass. 1832-43.

(7) Born in 1788, Dartmouth 1806, studied with Daniel Webster, Judge Massachusetts Supreme Court 1848.

(8) Born in 1815, Harv. 1837, U. S. Dist. Atty. 1861-66.

(9) Born in 1799, Dartmouth 1819, U. S. Senator 1841-45, Mass. Atty. Gen. 1853-54.

*Prouty v. Ruggles*. In 1849, Benjamin R. Curtis(1) argued the noted case of *Peck v. Jenness* (7 Howard 612).

New York sent a distinguished list of counsel, Ogden Hoffman, John C. Spencer,(2) Benjamin F. Butler,(3) Charles O'Connor,(4) Samuel Beardsley,(5) George Wood, Daniel Lord,(6) William H. Seward,(7) and Edward M. Dickerman.

The District of Columbia lawyers Key, Coxe, Mason, Simms, and the veteran Thomas Swann (until his death in 1840) argued a vast number of cases.

From Illinois, Abraham Lincoln(8) appeared, in 1850, in *Brabster v. Gibson* (9 Howard 261).

William Wirt of Maryland continued in constant and vigorous practice up to his death in 1834. Among his prominent confrères were Roger B. Taney and John Nelson; and in 1839, first appeared the man who was to be for many years the chief competitor of Webster at the Bar, Reverdy Johnson.(9)

From Kentucky came Clay, Bibb, Wickliffe, John J. Crittenden(10); from Georgia, John McPherson Berrien and William H. Crawford; from Mississippi, Robert J. Walker(11) and Sergeant S. Prentiss(12).

From Missouri came Thomas H. Benton, who argued the great case of *Craig v. Missouri* (4 Peters 410) in 1830.

From Ohio there were Henry Stanberry(13) and Salmon P. Chase,(14) who first appeared in 1836.

(1) Born in 1809, Harv. 1829, Judge United States Supreme Court 1851.

(2) Born in 1786, son of Chief Justice Ambrose Spencer, Union College 1803.

(3) Born in 1785, U. S. Atty. Gen. 1833-38.

(4) Born in 1804.

(5) Born in 1790, Judge N. Y. Supreme Court 1844, Chief Justice 1847

(6) Born in 1795, Yale 1814, studied at the Litchfield Law School.

(7) Born in 1801 Union Coll. 1816-19, studied with John Anthon, John Duer and Ogden Hoffman, Governor 1838-42, U. S. Senator 1849.

(8) Born in 1809.

(9) Born in 1796, St. Johns Coll., U. S. Atty. Gen. 1849-50.

An interesting article on the *Supreme Court* in 1853-4 in *American Law Register*, Vol. IV (1853-54), says that "the largest practice before the Court is that of Reverdy Johnson."

(10) Born in 1787, William and Mary Coll. 1807, 1809 Atty. Gen. of Terr. of Illinois, 1817, 1829-35 U. S. Senator from Kentucky, 1827 U. S. Dist. Atty.

(11) Born in 1801, U. of P. 1819, U. S. Senator 1836-45, Sec. of Treasury 1845-49.

(12) Born in 1808, Bowdoin 1826.

(13) Born in 1803 Washington Coll. 1819, Atty. Gen. of Ohio 1846, U. S. Atty. Gen. 1866-68.

(14) Born in 1808, Dartmouth 1826, studied with Wirt 1827.



From Pennsylvania, the veteran John Sergeant headed the list of eminent lawyers, which also included Horace Binney, Charles J. Ingersoll, Joseph R. Ingersoll, William M. Meredith, James Campbell, (1) Edwin M. Stanton, (2) Henry D. Gilpin, (3) George M. Dallas (4) and Job R. Tyson (5).

The death of Webster in 1853, of Clay in 1852 and of Calhoun in 1850, removed three of the greatest legal lights of this period. (6)

The Attorney Generals were Roger B. Taney of Maryland (1831-1833) Benjamin F. Butler of New York (1833-1838), Felix Grundy of Tennessee (1838-1840), Henry D. Gilpin of Pennsylvania (1840-1841), John J. Crittenden of Kentucky (1841), Hugh S. Legaré of South Carolina (1841-1843) John Nelson of Maryland (1845), Nathan Clifford of Maine (1846-1848) Reverdy Johnson of Maryland (1849) John J. Crittenden of Kentucky (1850), and Caleb Cushing of Massachusetts (1850-1857), and Jeremiah S. Black of Pennsylvania (1857-1860).

#### FEDERAL LAW.

The changes on the United States Supreme Bench during these years were many. (1) Senator Hoar in his autobiography says that, when his brother E. Rockwood Hoar visited Washington in 1836, "Webster received him with great kindness, showed him about the capital and took him to the Supreme Court where he argued a case. Mr. Webster began by alluding very impressively to the great change which had taken place in that Tribunal since he first appeared as counsel before them. He said: 'No one of the judges who was here then, remains. It has been my duty to pass upon the question of the confirmation of every member of the Bench; and I may say that I treated your honors with entire impartiality, for I voted against every one of you.'"

(1) Born in 1812, Atty. Gen. of Penn. 1852.

(2) Born in 1814, Kenyon Coll. 1831-33.

(3) Born in 1801, U. of P. 1819, studied with Joseph R. Ingersoll, U. S. Dist. Atty. 1832, U. S. Atty. Gen. 1840-41.

(4) Born in 1803.

(5) Born in 1792, Princeton 1810, U. S. Dist. Atty. 1829, U. S. Senator 1831, Atty. Gen. of Penn. 1833.

(6) In 1834, William Johnson of South Carolina died and James M. Wayne of Georgia took his place, in 1835. Philip P. Barbour of Virginia was appointed, in 1836, in place of Gabriel Duval (resigned). Taney succeeded Marshall as Chief Justice, March 15, 1836. In 1837, the number of judges was increased from seven to nine; and John Catron of Tennessee and John McKinley of Alabama were appointed.

When Chief Justice Marshall died, in 1835, most of the fundamental doctrines of American Constitutional Law and of International Law as applied by the courts of this country had been firmly established. Of Marshall's creative part, mention has already been made. How great was his physical share of the work may be judged from the following figures. Between 1790 and 1801, there had been only 6 constitutional questions involved in cases before the Supreme Court. Between 1801 and 1835 there was 62 decisions involving such questions, in 36 of which Marshall wrote the opinion. Of a total of 1,215 cases during that period, in 94, no opinions were filed; in 15, the decision was "by the court"; and in the remaining 1,106 cases, Marshall delivered the opinion in 519.(1)

In the same period, there were 195 cases involving questions of International Law, or in some way affecting international relations.

In 80 of these, the opinion was delivered by Marshall; in 37, by Story; 28, by Johnson; 19, by Washington; 14, by Livingston; 5, by Thompson; and 1 each by Baldwin, Cushing and Duvall; in 8, "by the court." (2)

After the accession of Chief Justice Taney to the Bench, in 1836, the decisions of the Supreme Court showed a decided reaction from the centralizing views of Marshall. This was first seen in three cases in 1837. In *New York v. Miln* (11 Peters 103), argued by D. B. Ogden of New York against Walter Jones, involving the New York statute requiring certain information as to all passengers arriving in the Port of New York, the statute was held constitutional as not being a regulation of interstate commerce. In *Briscoe v. Bank of Commonwealth of Kentucky* (11 Peters 257), in which Henry Clay appearing for the defendant scored one of his greatest legal triumphs, the State statute was upheld, in an opinion which seemed to Story, who dissented, in

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In 1841, Peter L. Daniel of Virginia succeeded Barbour on the latter's death. In 1844, Robert C. Grier of Pennsylvania succeeded Henry Baldwin. In 1845, Samuel Nelson of New York took the place of Smith Thompson, who died in 1843. In the same year, Levi Woodbury succeeded Story; and was himself succeeded on his death, in 1851, by Benjamin R. Curtis of Massachusetts. In 1852, John A. Campbell of Georgia succeeded McKinley. In 1856, Nathan Clifford of Maine took Benjamin R. Curtis' place on the latter's resignation.

(1) *The Development of the Constitution as Influenced by Chief Justice Marshall*, by Henry Hitchcock (1889).

(2) Address by John Bassett Moore before the Delaware State Bar Association, Feb. 5, 1901.

direct opposition to Marshall's view, as expressed in 1830 in *Craig v. Missouri*. The third, the Charles River Bridge case, has already been described.

It was this reaction which led Story to write, May 10, 1837:

There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good.

And a writer in the *North American Review*, commenting on volume eleven of *Peters Reports*, said (1):

Within a brief space we have seen the highest judicial corps of the Union wheel about in almost solid column and retread some of its most important steps.

It is quite obvious that old things are passing away. The authority of former decisions which had long been set as landmarks in the law is assailed and overthrown by a steady, destructive aim from the summit of that stronghold, within which they had been entrenched and established.

. . . . It is very remarkable also that all the principles yielded by these decisions either have relation to the sovereign powers of the Union or to the very essence of social obligation. . . . We can hardly avoid the reluctant impression that it (the judiciary) has already capitulated to the spirit of the old confederation; and that we are fast returning, among other things, to an old continental currency, and to what were once denominated, moreover, anti-federal doctrines.

Under the progressive genius of this new judicial administration we can see the whole fair system of the Constitution beginning to dissolve like the baseless fabric of a vision.

While the doctrine of State sovereignty was upheld in these cases, succeeding cases soon dissipated the view that in Taney the States' rights men would find a firm adherent. No judge,—not even Marshall himself,—did more to place the Federal courts in a position of power and dignity than Taney, by his later decisions on the rights of corporations and to sue and to be sued in Federal courts and to do business in States outside those of their incorporation, and by his decisions on the extent of the admiralty jurisdiction. Most of the decisions of importance between 1830 and 1845 have already been noted in Chapters XXIII and XXV (*supra*).

(1) See *Constitutional Law, a Review of XI Peters*, in *North Amer. Rev.*, Vol. XLVI, (Jan. 1838).

In 1847, arose the celebrated *License Cases*, involving the constitutionality of the prohibitionist liquor legislation in Rhode Island, Massachusetts and New Hampshire—*Thurlow v. Massachusetts* (5 Howard 504). In these cases, Webster, Rufus Choate and John Davis of Massachusetts and Samuel Ames<sup>(1)</sup> and Richard W. Greene of Rhode Island appeared as counsel. In general, the State statutes were upheld, as not being an interference with interstate commerce. In this same year, the Court foreshadowed in *Waring v. Clarke* (5 Howard 441) the extended admiralty jurisdiction which, four years later, it was to establish. This famous case was argued by Reverdy Johnson against John J. Crittenden; and a similar case was argued with it by Ames and Whipple of Rhode Island against Webster and R. W. Greene.

In the same year (1847), the famous case of *Jones v. Van Zandt* (5 Howard 215) was decided, in which the slavery question had been argued at great length by William H. Seward and Salmon P. Chase<sup>(2)</sup> against Senator James T. Morehead of Kentucky<sup>(3)</sup>. It involved the constitutionality of a statute imposing a penalty for harboring a fugitive slave. In view of the fact that only ten years later, in 1857, in the *Dred Scott* case, the Court attempted to settle by judicial decision, the political question of slavery, it is curious to note that at this time—the year of the Mexican war, and three years before the passage of the compromise and Fugitive Slave Act of 1850, the Court refused to consider the political question involved, Judge Woodbury saying in his opinion:

But before concluding, it may be expected by the defendant that some notice should be taken of the argument urging on us a disregard to this subject on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question settled by each State for itself; and the Federal power over it is limited and regulated by the sacred compromises, and which we possess no authority as a judicial body to modify or overrule. . . . What-

(1) Born in 1806, Brown 1823, Chief Justice of Rhode Island 1856-65.

(2) Salmon P. Chase, from this argument and from his appearance in numerous other slave cases at this time acquired the title of "the Attorney General for runaway negroes."

See interesting account of this case in *Life of William H. Seward*, by Frederic Bancroft (1900). and *Life and Public Services of Salmon Portland Chase*, by J. W. Schuckers (1874).

(3) Born in 1797, Transylvania Univ. 1818, Governor of Ky. 1834, U. S. Senator 1841.

ever may be the theoretical opinions of any as to the expediency of some of those compromises or of the right of property in persons which they recognize, this Court has no alternative, while they exist, but to stand by the Constitution and laws with fidelity to their duties and their oaths. Their path is a straight and narrow one, to go where that constitution and laws lead, and not to break both by travelling without or beyond this.

In 1849, the subject of the Dorr's Rebellion in Rhode Island arose in *Luther v. Borden* (7 Howard 1) argued by B. F. Hallett and John H. Clifford of Massachusetts against Daniel Webster and Whipple of Rhode Island. In this case, Chief Justice Taney, in one of his finest legal opinions, held the question a political one, and declined to interfere.

The important cases known as the *Passenger Cases*—*Smith v. Turner* and *Norris v. Boston* (7 Howard 283) were decided at this term. They involved the constitutionality of the passenger tax statutes of New York and Massachusetts, of which Webster wrote to his son, Feb. 7, 1847: "It is strange to me how any Legislature of Massachusetts could pass such a law. In the days of Marshall and Story it could not have stood one moment. The present judges I fear are quite too much inclined to find apologies for irregular and dangerous acts." He wrote, Feb. 3, 1849:

"In my poor judgment the decision will be more important to the country than any decision since that in the Steamboat cause." The Court itself was so gravely impressed with the question presented and so divided in opinion that the cases were argued six times—the New York case in December, 1845, by D. B. Ogden of New York and Webster against John Van Buren, then Attorney General of New York and Willis Hall, Ex-Attorney General, again in December, 1847, and a third time in December, 1848; the Massachusetts case was argued first by Webster and Rufus Choate against John Davis of Massachusetts in December, 1846, again by Choate against Davis in December, 1847, and a third time by Webster, Rufus Choate, and J. Prescott Hall of New York against John Davis and George Ashmun of Massachusetts in December, 1848. The State laws were held unconstitutional. (1)

(1) See letters of Webster to Fletcher Webster, Feb. 7, 1847, Dec. 7, 1847, Jan. 1848, June 10, 1849; to J. Prescott Hall, Feb. 10, 1849; and to S. Blatchford, Feb. 3, 1849, in *Writings, Letters and Speeches of Samuel Webster*, Vol. XVI and XVIII (1903).

The year 1850 saw the first case in the United States Supreme Court in which a railroad was a party.

In this year also, the struggle for supremacy between the steamboats and the railroads came to the front, in the great case of *Pennsylvania v. Wheeling and Belmont Bridge Co.*, (9 Howard 647), argued by Edwin M. Stanton against Reverdy Johnson "with a degree of ability and learning worthy of the palmiest days of the old Bar of the Supreme Court."<sup>(1)</sup> It was held that the bridge was an obstruction to commerce, and also a nuisance as an infringement on the Common Law rights of the State of Pennsylvania.

In 1851, the question of the right of the States to legislate on matters affecting interstate commerce in the absence of Congressional legislation on the subject arose in *Cooley v. Port Wardens* (12 Howard 299) a case involving the pilotage laws of Pennsylvania and argued by Phineas P. Morris and Job R. Tyson against James Campbell and George M. Dallas.

The case definitely settled the long struggle which had been going on since *Gibbons v. Ogden* in 1824 over the field of national control of commerce. The decision "separated the field over which Congress is given the power of regulation into two smaller fields—one consisting of matters of a general nature in which Federal jurisdiction, whether exercised or not, exclude all State action; the other field consisting of matters of a local nature in which the States may act until superseded by Congress."<sup>(2)</sup>

In this year came the decision in the *Genesee Chief* (12 Howard 443) a case argued by Stanley P. Mathews of Ohio against William H. Seward of New York. Chief Justice Taney held that the old Common Law doctrine that admiralty jurisdiction was confined to the ebb and flow of the tide was unsuited to this country and that the admiralty courts extended to the Great Lakes and all navigable waters of the country. This decision was of extreme importance to American internal commerce, for it threw into the Federal courts a vast range of torts and contracts connected with shipping and maritime matters, thus giving

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(1) *History of the Supreme Court of the United States*, by H. G. Carson, Vol. II.

For interesting account of the important case see *Life and Public Services of Edwin M. Stanton*, by George C. Gorham (1899).

(2) See *The Right to engage in Interstate Commerce*, by E. P. Prentice *Harv. Law Rev.*, Vol. XVII (1903); and see comments in *Crandall v. Nevada*, 6 Wall. 42; and *Mobile v. Kimball*, 102 U. S. 702.

a unity to this branch of the law extremely desirable in view of the development of the growing commerce in the new Western States.(1)

In 1854, the case of *Smith v. Swormstedt* (16 Howard 288) involving the division of the great Methodist Episcopal Church into two organizations one for the slave holding States and one for the other States, argued by Stanberry against Badger and Ewing, throws a light on the manner in which the slavery question entered even into religion. In 1855, this question presented itself in its most dangerous form in the case of *Dred Scott v. Sanford*, argued by Montgomery Blair of Maryland(2) and George Ticknor Curtis of Massachusetts(3) for the slave Scott, and Reverdy Johnson and H. S. Geyer of Missouri(4) for the owner. It was reargued in 1856, and the opinion was given March 6, 1857, two days after the inauguration of President Buchanan (19 Howard 393).

No more fatal legal or political delusion ever appeared in any judicial decision than in the following words of Mr. Justice Wayne.

The case involves private rights of value and constitutional questions of the highest importance about which there had become such a difference of opinion that the peace and harmony of the country required the settlement of them by judicial decision.

Few other cases of importance were decided prior to 1860, except that of *Ableman v. Booth* (21 Howard 506) in 1859 in which the constitutionality of the Fugitive Slave Act of 1850 was upheld, and the judgment of the Supreme Court of Wisconsin declaring it unconstitutional was reversed.

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(1) See article in *American Law Register*, Vol. I (1852).

"As questions of collisions and on the law of carriers are daily arising especially in our western waters our readers will see the very important character of this decision."

(2) Born in 1813.

(3) Born in 1812, Harv. 1832.

(4) Born in 1790, U. S. Senator 1851-57.

## CHAPTER XXXV.

### NEW LAW 1830-1860.

The years 1830 to 1860 constitute a period of legal development in State and Federal law greater than any period in the legal history of the country. During these years, students and practitioners of law were witnessing the slow up-building of many a legal structure now complete.

Two things are especially characteristic of this era—the first being the increasing recognition of individual rights and protection to individuals<sup>(1)</sup>—the emancipation of married women; the safeguards thrown around infants, insane and criminals; prison reform; milder forms of criminal punishment; abolition of imprisonment for debt; the treatment of bankruptcy as a misfortune and not a crime; the removal of the bars against the testimony of witnesses and parties in civil and criminal cases; the recognition of labor unions; and the simplification of the law by codes and statutory revisions, for the benefit of laymen as well as lawyers.

These radical changes in personal status brought about by statutes and judicial decisions were undoubtedly due in considerable measure to a political change, the influence of which has never received adequate attention—the gradual abolition, from 1820-1840, of property qualifications for voting and for holding office. Such property qualifications had existed in Connecticut, until 1818; in Massachusetts and New York, until 1821; in Virginia and Tennessee, until 1830; and in some other States for ten or fifteen years later. Their abolition, however, changed the character of the electorate, democratized it, altered the constituent parts of the Legislatures, and thus produced entirely new tendencies in legislation. This broadened spirit of the statutes after 1820 is very noticeable; and as the courts of the United States are generally responsive to their surroundings, the trend of judicial decisions shows the influence of the democratic popular voice.

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(1) See *Jurisprudence —Its Development during the past Century*, by Joseph H. Beale, Jr.,—*Congress of Arts and Sciences*, Vol. VII (1906).



The abolition of property qualifications, therefore, while responsible, in politics, for the birth of the new Democratic party and the election of President Jackson and his successors, was also unquestionably a factor in the liberal and progressive, sometimes radical, decisions for which the courts (especially in Massachusetts, New York, and Pennsylvania) were noted during this era.

The second characteristic of the era was the remarkable modernization of old legal doctrines. The inventions of the 19th Century were a severe test of the malleability of the old Common Law, and of its capability of adaptation to fit the new economic, commercial and social conditions. It was to the everlasting credit of the great judges and of the great lawyers of the times that the Common Law was proved fully adequate to meet the strain.

One jurist stood out above all others in his ability to shape the Common Law to modern needs—Lemuel Shaw, the great Chief Justice of Massachusetts, whose term of service on the bench covered exactly these thirty years (1830-1860).

In the words of the address presented to him upon his retirement, Sept. 12, 1860, by the Bar of Massachusetts:

It was the task of those who went before you, to show that the principles of the common and the commercial law were available to the wants of communities which were far more recent than the origin of those systems. It was for you to adapt those systems to still newer and greater exigencies; to extend them to the solution of questions, which it required a profound sagacity to foresee, and for which an intimate knowledge of the law often enabled you to provide, before they had even fully arisen for judgment. Thus it has been, that in your hands the law has met the demands of a period of unexampled activity and enterprise; while over all its varied and conflicting interests you have held the strong, conservative sway of a judge, who moulds the rule for the present and the future out of the principles and precedents of the past. Thus too, it has been, that every tribunal in this country has felt the weight of your judgments, and jurists at home and abroad look to you as one of the great expositors of the law. . . .

In so great reverence was "the Old Chief", as he was affectionately called, held by the public, that the story is told that when inquiry was made of a member of the Massachusetts Constitutional convention of 1853, "What are they doing at the State House?" the reply was, "Discussing whether Judge Shaw is a

divine institution or a human contrivance"(1). (The debate was on the question of an Elective Judiciary.)

Shaw's general attitude of mind in approaching the problems of law as affected by modern conditions of life is well illustrated in the following sentence from one of his early opinions(2):

The case of a vessel towed by a steamboat is certainly new in facts and could not have been anticipated by the founders of the Common Law; but it is one of the advantages of the Common Law that it depends upon plain, equitable and practicable principles, adapted to all times and occasions and broad and comprehensive enough to embrace new cases as they arise.

Probably the greatest services which Shaw performed to the commercial development of the United States were in the doctrines which he laid down as to railroads (already described in Chapter XXXI) and as to water courses.

#### MILL ACT AND WATERCOURSE LAW.

In 1829, in a review of *Angell on Watercourses* which had appeared in that year, the *American Jurist* said:

The law in relation to water courses is every day becoming more important as our mills and manufactories multiply and the improvements in the service of agriculture lead to a more general application of water to the purposes of husbandry.

It was Judge Shaw who placed these mills and manufactories on a firm foundation, by establishing the constitutionality of the so-called "Mill Acts", which allowed a mill owner to dam a stream and to flow neighboring lands on payment of damages. These acts, in derogation of Common Law doctrines, had been passed in the latter part of the 18th Century simply to aid the growth of grist mills on small streams, and without thought of their application to large factories. But as the protective tariff policy of the country became fixed and as great cotton, iron and

(1) Being a man of strong views on all matters as well as on the law Judge Shaw was frequently treading on people's toes of which the following entry in Richard H. Dana's diary, April 8, 1856, gives an amusing glimpse:

"The truth is, Judge Shaw is a man of intense and dotting biases in religious, political and social matters. Unitarianism, Harvard College, the social and political respectabilities of Boston are his *idola specus et fori*."

See *Richard Henry Dana*, by C. F. Adams, Vol. I.

(2) *Sproul v. Hemenway*, 14 Pick. 1 (1833).

woolen mills were built on the rivers, these corporations and other large mill dam corporations took advantage of these old statutes, to flood large tracts of land and secure very valuable water powers—the more valuable because prior to 1845 the railroads were not yet bringing coal in any quantity out of Pennsylvania.

Naturally, the farmers whose lands were flooded felt this mill act privilege to be a hardship on them, and a conflict arose, the results of which were to have immense effect on the business growth, especially of manufacturing New England.(1)

Shaw's predecessor, Chief Justice Isaac Parker had viewed the application of old law and old conditions to the modern uses as a somewhat doubtful policy and had said in a case in 1814(2):

I cannot help thinking that this statute was incautiously copied from the ancient colonial and provincial acts, which were passed when the use of mills, from the scarcity of them, bore a much greater value compared to the land used for the purposes of agriculture than at present. But with this we have nothing to do. As the law is, so we must declare it.

Chief Justice Shaw, however, in a series of decisions beginning in 1831 and continuing up to 1853, firmly fixed the doctrine that the provisions of these Mills Acts so tended to promote the public interest that they must be upheld as constitutional, on grounds of public policy—either as an exercise of the right of eminent domain, or (in later decisions) as a part of the police power regulating for the public convenience relative rights of riparian proprietors. Thus he said in 1831(3):

(1) "Under the present system of the laws of Massachusetts, the yeomanry of that State especially the small farmers often feel that they are oppressed and the question is often asked whether the exercise of such a power by one citizen over another can be constitutional. . . . The ordinary rules of right and wrong as to the enjoyment of private property seem not to apply to estates which border on any of the beautiful and healthy streams which enliven our scenery. They may be sacrificed to the speculating spirit of the manufacturers. No matter with what labor acquired, no matter with what fond associations connected, the farmer may be obliged to yield his acres to another's enjoyment; and the soil which his fathers may have tilled, the tree which sheltered him in his childhood, the scenes of his early sports, and the very graves of his kindred, may fade beneath the hand of the manufacturer and the shiny pool which drives his spindles may send forth its miasmata where the green meadow and the waving harvest once greeted the eye. And for this the recompense to be sought is an annuity to be estimated by strangers."

See *American Jurist*, Vol. I (1829).

(2) *Stowell v. Flagg*, 11 Mass. 368 (1814).

(3) *Fiske v. Framingham Mfg. Co.*, 12 Pick. 68 (1831).

We think these rights will be found to rest for their justification, partly upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property which is often so situated that it could not be beneficially used without the aid of the power.

and finally in *Hazen v. Essex Co.* (12 Cush. 478), in 1853, he summed up:

The establishment of a great mill power for manufacturing purposes as an object of great public interest and especially since manufacturing has come to be one of the great public industrial pursuits . . . seems to have been regarded by the Legislature and sanctioned by the jurisprudence of the Commonwealth, and in our judgment rightly so in determining what is a public use justifying the exercise of the right of eminent domain.

Such were the broad gauge lines on which Shaw developed this law. In a similar spirit of regard for modern industrial conditions he gave his great decisions which settled the law of riparian proprietors' rights. These decisions were followed very generally in other States. Had the cases been decided on narrower lines, the commercial career of many of the States of this country would have been greatly changed.

#### THE LAW OF TORTS.

With the advent of railroads and the body of law which arose out of their relations to the public and to their employees came the development of the Law of Torts in the branch with which modern courts are chiefly concerned with it—Accident Law.

As is well known the Common Employment or Employer's Non-Liability doctrine was established in this country in 1842—five years later than in England<sup>(1)</sup>—by Chief Justice Shaw in the noted case of *Farwell v. Boston and Worcester R. R.* (4 Metc. 49).

As already noted (Chapter XXXI) the decision in this case was largely influenced by economic conditions and the need of favoring the young and struggling institution of railroads even if such action placed a burden on a class less able to bear it.

The tendency to favor and promote the newly instituted railroads was seen also in a leading case which arose in Massa-

(1) *Priestley v. Fowler*, 3 Meeson and Welsby, was decided in England, in 1837.

chusetts three years after the Farwell case—that of *Ingalls v. Bills* (9 Metc. 1), in 1845. In this case, splendidly argued by Simon Greenleaf, then Professor at the Harvard Law School, as counsel for the winning defendant, it was held that a stage coach proprietor or common carrier was not liable to a passenger for damages caused by latent defects in a vehicle. The decision was undoubtedly influenced by the fact that a contrary holding would have borne hardly on the struggling railroads. It was bitterly criticized on this account by the *Law Reporter* at the time, as upholding the doctrine that the rights of property were regarded as more sacred than those of the person.

The lateness of the development of the branches of Accident Law which now fill the law reports may be realized in noting that the first accident case brought in a manufacturing State like Massachusetts by an employee against a manufacturing corporation was in 1850(1); and in *Redfield on Railway*, published as late as 1858, only five pages are devoted to the law relating to accidents caused by negligence of fellow servants or use of machinery and appliances. The first accident case for defect in a sidewalk brought in Massachusetts against a city or town was in 1849(2).

Actions for death caused by negligence arose in England after the passage of Lord Campbell's Act (9 & 10 Vict. c. 93), in 1846. New York followed in this country by giving similar cause of action, through a statute passed in 1847; and Ohio, Pennsylvania, and Indiana, in 1851.

The question of the right of recovery at Common Law in such cases had arisen for the first time in a case in Massachusetts in 1848, in which the court denied the right, saying: "These actions raise a new question in our jurisprudence. . . . If such a law would be expedient for us, it is for the legislature to make it."(3)

The slight part which Torts played in the law of the day may be seen from the fact that the first American law book on the subject did not appear until 1859—Francis Hilliard's *The Law*

(1) *Albro v. Agawam Canal Co.*, 6 Cush. 75 (1850).

(2) *Bacon v. Boston*, 3 Cush. 174 (1849).

(3) *Carey v. Berkshire R. R. Co.*, 1 Cush. 475 (1848).

In a note relative to this case in *United States Law Magazine* for Jan., 1851, it is said: "The question, entirely new in our jurisprudence, was here raised concerning the legal right to complain in a civil court for the death of a human being as an injury. At the argument, no case was cited in which a like action had been the subject of adjudication, or even of discussion."

of *Torts and Private Wrongs* of which the *Law Reporter* (Vol. XXII) said in a review.

This work is a well conducted attempt to do for the law of private wrongs what has been so often and so elaborately done for simple contracts, to collect in one book the principles and cases applicable to all the various departments of the general subject: An attempt, as the author justly says, never made before either in England or America excepting in a very general way as for example in *Blackstone's Commentaries*.

The Law of Torts was of course much developed through the introduction of the many new inventions for which this period was especially noted, changing so greatly the economic, social and commercial conditions of the times.

#### TELEGRAPH LAW.

The electric telegraph was first put in successful operation in 1844, and with that year began a new body of law relating to this invention. In 1849, the first statute in Massachusetts relating to telegraph companies was enacted, and one of the early cases in the United States involving the new invention was a case of injury to a traveller on the highway from a telegraph pole established under this statute—*Young v. Yarmouth* (9 Gray 386), in 1857.(1)

The first reported telegraph case arose in 1851, in one of the inferior courts of Pennsylvania, involving a statute forbidding disclosure of a message.(2)

In the next nine years through the year 1860, only fifteen cases arose, relating to telegraph companies. Most of these cases involved the question of the liability of the companies for mistakes in transmission or delivery of messages, whether the company was to be subject to the liability of insurer as a common carrier, and regardless of negligence. By 1860, the law was well settled against such liability(3)—another instance of the tendency of the courts to construe the Common Law in aid of the promotion of a new industry.

The first telegraph case in the United States Supreme Court

(1) See also *Byron v. N. Y. State Printing Tel. Co.*, 26 Barb. 39 (1859).

(2) See *Telegraph Cases*, by Charles Allen (1873).

(3) See the famous "two hundred bouquets" case of *N. Y. and Washington Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298 (1866).

was decided in 1858—*Western Tel. Co. v. Magnetic Tel. Co.* (21 Howard 456) in which it was held that where there was no infringement of patent, no company had a monopoly of the right to telegraph between two places. "It must be expected that great competition will exist in the transmission of intelligence, when telegraphic lines have been established throughout the country."

No case was reported in Massachusetts until 1866 when it was held that telegraph companies were not subject to the liability of common carriers—*Ellis v. Amer. Tel. Co.* (13 Allen 226), Chief Justice Bigelow (Shaw's successor) saying:

It appears to have been taken for granted at the trial of this case, as it certainly was in the arguments of learned counsel at the bar of this court that the rights of the parties were to be determined solely by having recourse to the rules and principles of the Common Law. This we think an error. We entertain no doubt that these would have been found fully adequate to the satisfactory solution of the various questions to which the pursuit of this novel branch of human skill and industry will in the course of time necessarily give rise. But the legislature of this Commonwealth have not deemed it wise or expedient to leave to the slow progress of judicial determination the regulation of a business on which so many of the daily transactions of life involving the most important rights and interests are made to depend.

#### GAS CORPORATION LAW.

Another economic improvement in this era introduced a new line of cases and a new topic in the law—the liability of gas corporations.

The first negligence case in the United States against a gas company was in 1850—*Brown v. N. Y. Gaslight Co.* (Anthon's N. P. Cases 351). The first case in Massachusetts was for negligence in allowing leaks—*Holly v. Boston Gas Light Co.* (8 Gray 123), in 1857.

Similar cases for injuries due to escaping gas arose in many instances in Connecticut, New York and Pennsylvania 1850-1860.(1)

#### STREET RAILWAY LAW.

In 1852, the first successful street railway was started in New York. In 1853, the Cambridge Street Railway Company and

(1) *Digest of Gas Cases*, by Charles P. Greenough (1883).

the Metropolitan Street Railway Company were chartered in Massachusetts, and began running in 1856. The first comprehensive case, dealing with the respective rights of street cars and other travellers on the highway was decided in 1860—*Commonwealth v. Temple* (14 Gray 69), the opinion in which was one of the greatest as well as one of the last of Chief Justice Shaw's opinions, and displayed his wonderful ability to adopt the Common Law to new conditions:

Since horse railroads are becoming frequent in and about Boston and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them should be distinctly known, and understood, in order to accomplish all the benefits, and as far as practicable avoid the inconveniences, arising from their use. . . . These railroads being of recent origin, few cases have arisen to require judicial consideration, and no series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise.

But it is the great merit of the Common Law that it is founded upon a comparatively few broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged, and which at first are few and simple; but which, carried out in their practical details and adapted to extremely complicated cases of fact, give rise to many and often perplexing questions. Yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

The first accident case against a street railway in Massachusetts was decided in 1862—*Wright v. Malden and Melrose Street Ry.* (4 Allen 283).

#### GRAIN ELEVATOR LAW.

In the decade 1850-1860, economic conditions in Europe and in the United States were laying the foundations for a new branch of law relating to the cultivation and storage of grain. The year 1854 marked the culmination of bad crops and political troubles in Europe.(1) Immigration to the United States was

(1) George Ticknor wrote to King John of Saxony, Nov. 20, 1855. See *Life and Letters of George Ticknor*, Vol. II:

"Your short crops in Europe are filling the great valley of the Missis-



at its highest, having grown from 114,371 in 1845 to 427,833. These immigrants, and the emigrants from New England sent out under the auspices of the New England Emigrant Aid Company to save Kansas from slavery, were about to develop the great Western farm lands.

In this year 1854, the great case of *Seymour v. McCormick* (15 Howard 480), sustaining the validity of the McCormick Reaping Machine patent was decided in the United States Supreme Court. By 1855, grain elevator and warehouse law began to come into prominence in the law reports in Ohio, Iowa and Wisconsin(1); and by 1867, it was said in a Massachusetts case—*Cushing v. Breed* (14 Allen 376): "The use of elevators for the storage of grain has introduced some new methods of dealing; but the rights of parties who adopt these methods must be by the principles of the Common Law."(2)

#### INSURANCE LAW.

In the early years of this period 1830-1860, the only form of insurance which received any great development was Marine Insurance and the law reports are strikingly filled with cases on this subject. In the making of this law, as well as in that of Patents and Copyrights, Judge Joseph Story stood at the head of all judges.

Arnould in the preface to his book on *Marine Insurance* published in London in 1848, says:

I have resorted generally to the decisions of the American tribunals on the many novel and interesting points in the law of Marine Insurance which in a commerce of vast activity and a

issippi with population and wealth. The wheat which it costs the great farmers in Ohio, Illinois and Michigan—whose population in 1850 was above three millions and is now above four—the wheat which costs \$40 to those great farmers to raise, they can sell at their own doors for above \$100 and it is sold in London and Paris for nearly \$300. Indeed your European wars are not only making the States in the valley of the Mississippi the preponderating powers in the American nation but you are making them the granary of the world, more than ever Egypt and Sicily were to Rome. So interchangably are the different parts of Christendom connected, and so certainly are the fates and fortunes of each in one way or another dependent on the condition of the whole. The war in the Crimea raises the price of land in Ohio. . . . The prolétaires of Paris enrich the farmers in Illinois of whose existence they never heard."

(1) See especially *Chase v. Washburn*, 1 Ohio St. 244.

(2) See also articles by Oliver Wendell Holmes, Jr., on *Grain Elevator Cases* in *Amer. Law Review*, Vol. VI.

sea coast of unrivalled extent seem to be continually arising for their adjudication. In the present state of legal knowledge, no work professing to treat with any tolerable degree of completeness the subject could avoid frequent reference to the Jurisprudence of the United States. The names of Chancellor Kent and Mr. Joseph Story have indeed an European celebrity which would make apology ridiculous for the citation of their authority.

Gradually, however, the subject of Fire Insurance attained importance, as the incorporation of mutual fire insurance companies became general. Yet as late as 1837, a report of a Commission in Massachusetts stated :

It is not too much to affirm that the whole law of insurance as far as it has been ascertained and established by judicial decisions and otherwise may now be stated in a text not exceeding thirty pages of the ordinary size.

And even in 1852, Chief Justice Shaw said in *Fogg v. Middlesex Fire Ins. Co.* (6 Cush. 336) :

Fire insurance as a branch of legal knowledge is, comparatively speaking, in its rudiments. The cases on marine insurance throw little, if any, light on the present question. . . . The question of loss by lightning is very summarily disposed of in the older authorities by treating electricity as fire from heaven. But the progress of knowledge has led to juster notions of the nature of lightning and of course to different conclusions touching its legal relations.

And in the same year, he said in *Scripture v. Lowell Mutual Fire Ins. Co.* (6 Cush 356) :

Fire insurance has become so important in the business of the community that it is much to be regretted that the practical management of the business is not conducted with more care and skill in its details so as better to secure the rights of the parties as they are to be established by the contract when rightly made and rightly understood.

The advent of steamboats and railroads making life more hazardous, was contemporaneous with a great growth of Life and Accident Insurance Companies and the rise of an entirely new body of law.

The earliest and one of the most noted Life Insurance Companies was chartered in Massachusetts in 1818—the Massachusetts Hospital Life Insurance Company. Kent in his *Commentaries* as late as 1844 (5th Edition) said :

The practice in Europe of life insurance is in a great degree confined to England and it has been introduced into the United States. It is now slowly but gradually attracting the public attention and confidence in our principal cities.

The only case cited by him on the subject was *Lord v. Dall*, decided in Massachusetts, in 1810.

Prior to 1850, five cases only had been reported as decided by the State and Federal courts on the subject; and "in some cases of the States no case has as yet been reported," said a writer in 1872(1).

The first question litigated was that of insurable interest—on which twelve cases were decided prior to 1860, the first case in Massachusetts arising in 1852—*Morrell v. Trenton Ins. Co.* (10 Cush. 282), and the leading case on the subject being decided by Chief Justice Shaw in 1856 "on the rules and principles of the Common Law" in *Loomis v. Eagle Life and Health Ins. Co.* (6 Gray 396).

On the important questions of false representation and warranty—a subject so much litigated later, the leading case arose in 1850 in Massachusetts—*Vose v. Eagle Life and Health Ins. Co.* (6 Cush. 421). In this case it was said:

Insurance on life was formerly held to be unlawful and was forbidden in some foreign countries by particular enactments as being repugnant to good morals and opening a door to abuses. But a very different view of the subject is taken at the present time. Life insurance has now become a very common and a very extensive business and is regarded as highly beneficial to the community.

As late as 1873, James Schouler in his book on *Personal Property* wrote:

Like the historian of some American State in the far West, the text writer on life insurance finds his materials fresh, and modern methods at work in shaping them. The lawyer discarding his Coke, Blackstone and Kent might lay his hand on a few volumes, perhaps exactly three which are hardly yet dry from the press and say that he had the whole jurisprudence of life insurance as a special subject so far as the English and American Courts had laid in open. Far different will it be twenty years hence.

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(1) *Digest of Life and Accident Insurance Cases*, by John R. Sharpstein (1872).

## PATENT LAW.

Between 1810 and 1830, the Supreme Court gave decisions in only five patent cases; and the Circuit Courts in only thirteen, most of which were decided by Judge Story, in the First Circuit. The real history of Patent Law in the United States dates from the year 1836, in which year, the building of the Patent Office, then a branch of the Department of State, was burned, destroying the models and records of the old system, under which only 10,020 patents had been issued. In that year also, a complete revision of the Patent Laws was enacted by Congress and the United States Patent Office (which, in 1849, became a branch of the Department of the Interior) was established.

As illustrative of the increase of patent litigation, it is to be noted that the list of adjudicated patents contains 18 patents issued between 1776 and 1815; 57 between 1816 and 1835; 395 between 1836 and 1859 inclusive.(1)

Between 1835 and 1845, a very large proportion of the patent cases in the country were tried before Judge Joseph Story in the United States Circuit Court in Boston—Benjamin R. Curtis, Franklin Dexter, Charles G. Loring, Benjamin Rand and Willard Phillips appearing as the principal counsel. It may also be noted that Professor Simon Greenleaf was counsel in many patent cases, one of the most noted being that involving the Phillips friction match patent of 1836—*Ryan v. Goodwin* (3 Sumner 514) in 1839.(2)

It was not until after 1845, however, that patent cases began to come before the United States Supreme Court in any number.

One of the early famous cases was decided in 1842—*Prouty v. Ruggles* (16 Peters 336), in which Rufus Choate argued against Franklin Dexter. In 1846, the Woodsworth planing machine patent of 1828 was involved in *Wilson v. Rousseau* (4 Howard 646) and other cases, one being argued by William H. Seward, John H. B. Latrobe(3) and Daniel Webster against

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(1) *Adjudicated Patents*, by Lineas D. Underwood (1907).

(2) Judge Story in his opinion said as to this patent:

"The combination is apparently very simple; but the simplicity of an invention, so far from being an objection to it may constitute its great result and value. Indeed to produce a great result by very simple means before unknown or unthought of is not infrequently the peculiar characteristic of the very highest class of minds."

(3) Born in 1803.

Thaddeus Stevens(1) ; another being argued by Henry D. Gilpin against John B. Henderson and Reverdy Johnson(2).

Stimpson's grooved railroad rail patent of 1831 was involved in the case of *Stimpson v. Baltimore and Susquehanna R. R. Co.*, in 1850, in which Brantz Mayer argued against James Campbell.

Tatham's lead pipe patent of 1846 was adjudicated in 1852 and, in 1859, in *Leroy v. Tatham* (14 Howard 156, 22 Howard 132).

In 1852, one of the most noted cases in all patent litigation involving one of the most bitterly fought patents—Goodyear's India rubber patent of 1844, was decided by Judge Grier sitting in the United States Circuit Court in New Jersey (2 Wall Jr. 283), the patent being upheld. In this case Daniel Webster made his last great legal argument, Rufus Choate being the opposing counsel.

In 1853, the head note to a case in 15 Howard announced the decision in a matter of immense import to the development, commercial, political and legal, of this country—the case of *O'Reilly v. Morse*. "Morse was the first and original inventor of the electro magnetic telegraph for which a patent was issued to him in 1840 and re-issued in 1848. His invention was prior to that of Steinheil of Munich or Wheatstone or Davy of England".

The counsel were James Campbell and George Harding of Philadelphia and Archer Gifford of New Jersey for Morse, and Ranson H. Gillett of New York and Salmon P. Chase of Ohio for O'Reilly. The practicability of this great invention had been proved nine years before, in 1844, by a line put in operation between Baltimore and Washington, under an appropriation from Congress.(3)

The next year, 1854, was marked by the decision in the case of *Seymour v. McCormick* (15 Howard 480), upholding the McCormick reaper patents of 1834, 1845, and 1847. The counsel were Thaddeus Stevens of Pennsylvania and Reverdy Johnson of

(1) Born in 1792, Dartmouth 1814.

(2) See also *Wilson v. Simpson*, 4 Howard 710, 9 Howard 109, 10 Howard 329.

(3) John Quincy Adams says in his diary May 27, 1844, "This was the day on which the two Democratic conventions to nominate candidates for the offices of President and Vice President . . . were held at Baltimore . . . By the new invention of the electro magnetic telegraph of Professor Morse the proceedings of those bodies . . . were made known here at the capital and announced as soon as received."

For interesting account of this early telegraph—see *Public Men and Events*, by Nathan Sargent, Vol. II (1875).

Maryland for McCormick, and Ranson H. Gillett, and Henry R. Selden of New York for Seymour. In the same year as the Dred Scott decision, (1857) another case involving this important patent was decided—*Seymour v. McCormick* (19 Howard 96) in which Edward M. Dickerman and Reverdy Johnson appeared for McCormick and H. R. Selden, P. H. Watson and Edwin M. Stanton for Seymour.(1)

To the decade of 1850-1860 belong also the great inventions of the breech loading fire arm, Elias Howe's sewing machine, the steam fire engine and the fire alarm telegraph.

The leading American law book on the subject of patents was published in 1837 by Willard Phillips.

#### COPYRIGHT LAW.

The law of copyright was practically formulated by Judge Joseph Story in his Circuit Court decisions 1830-1845,(2) and by the United States Supreme Court in the great case of *Wheaton v. Peters* (8 Peters 591), in 1834, in which Elijah Paine and Daniel Webster appeared for Henry Wheaton (the former Supreme Court Reporter) and Charles J. Ingersoll and John Sergeant for Richard Peters (the then Reporter).

Few cases came before the Supreme Court on this subject—the most important being *Stevens v. Gladding*, in 1854, (17 Howard 447).(3)

(1) For interesting account see *Lincoln as a Lawyer*, by Frederic Trevor Hill.

It is interesting to note that Abraham Lincoln acted as counsel for McCormick, with Reverdy Johnson and Edwin M. Dickerman, against Edwin M. Stanton and George Harding in the United States Circuit Court in *McCormick v. Manny* (6 McLean 529) in 1856.

(2) See *Gray v. Russell*, 1 Story 16; *Folsom v. Marsh*, 2 Story 113 (1841); *Emerson v. Davies*, 3 Story 779.

(3) It may be noted that coincident with the rise of copyright law came the great development of American literature and American journalism. The years 1835-1860 witnessed the production of the works of Emerson, Hawthorne, Lowell, Longfellow, Prescott, Motley, Bancroft, Hil-dreth and Whittier.

The *North American Review*, founded in 1815, was still in existence. The *American Quarterly Review* was published from 1827 to 1837; the *Knickerbocker Magazine* from 1833 to 1858. Of the great newspapers the *New York Herald* was first published in 1835, yet by 1846 it had a circulation of only 15,000. The *New York Tribune* started in 1841; the *New York Evening Post* in 1842 with a circulation of 2,500; the *Springfield Daily Republican* in 1844.

"American Journalism was undergoing the greatest transformation and experiencing the deepest inspiration of its whole history. The telegraph and the Mexican War came in together and the years 1846-51 were the years of most marked growth."

## TRADEMARK LAW.

Another branch of the law which practically originated in the years 1830-1860 was that of trademarks.

The first and only trademark case in the history of the country—(*Snowden v. Noah*)—a motion in the New York Court of Chancery by the owner of a newspaper called *The National Advocate*, for an injunction against the owner of *The New York National Advocate*, was tried before Chancellor Sandford, in January, 1825.

In 1837, the leading case of *Thomson v. Winchester* was decided in Massachusetts (19 Pick. 214) in which Theophilus Parsons and Charles Sumner were counsel for the defendant. Chief Justice Shaw held that it was a fraud to make and sell medicines as and for medicines made and prepared by the plaintiff—this decision being the foundation of the law of unfair trade in this country. In 1840, in *Bell v. Locke* in New York (18 Paige 75) the court was asked to enjoin the use of a trade name. In 1844, Judge Story in the United States Circuit Court in *Taylor v. Carpenter* (3 Story 458) granted the first injunction ever issued in this country restraining the infringement of a real trademark. From that year, the law may be said to have been definitely established. The first act for the protection of trademarks was passed in Massachusetts in 1852 c. 197(1).

The list of trademark and trade name cases between 1845 and 1860 numbers thirty-six(2) of which 28 were decided in inferior courts of New York, 5 in United States Circuit Courts, 2 in Rhode Island and 1 in Pennsylvania.

The law as to trade names were practically fixed by the noted decision of *Marsh v. Billings* in Massachusetts in 1851 (7 Cush. 322). This was an action of trespass on the case alleging injuries from the use by the defendant of the words "Revere House" in transporting passengers and baggage. The court said:

The principle involved is one of much importance to the plaintiff—

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A circulation of 2,000-4,000 copies was considered a good number for any Boston newspaper.

In 1841, *Graham's Magazine* was first published; in 1842 the *Southern Quarterly Review*; and in 1845 the *American Review*.

In 1850 *Harper's Monthly Magazine* was established; in 1853 *Putnam's Monthly Magazine*; in 1856 *Harper's Weekly*; and in 1857 the *Atlantic Monthly*.

(1) See *Amer. v. King*, 2 Gray 382 (1854).

(2) *Trademark Cases*, by Rowland Cox (1892).

iffs and to the public. But the principle is by no means novel in its demands . . . substantially the same which has been repeatedly recognized and acted on by courts in regard to fraudulent use of trade marks and regarded as of much importance in a mercantile community.

#### INDIVIDUALISM IN THE LAW.

As before stated, this era was especially characterized by the increasing recognition paid to individual rights and the protective safeguards through about the weaker classes.

No portion of the community was more favored by the development of the law between 1830 and 1860 than the debtor class.

#### INSOLVENCY AND BANKRUPTCY LAWS.

In the argument of David Daggett in *Sturgis v. Crowninshield* in 1819 it is said that, "no acts, properly called bankrupt laws, have been passed in more than four or five States. Rhode Island had an act . . . (adopted in 1756) by which the debtor might, on application to the Legislature be discharged from his debts. In New York, a law of the same character has been in operation since the year 1755, and also in Maryland for a long period, (since 1774). In Pennsylvania, a bankrupt law operating in the city and county of Philadelphia existed for two or three years; and in Connecticut, the Legislature has often granted a special act of bankruptcy on application of individuals. But in all the other States, these laws on this subject have been framed with reference to the exemption of the body from imprisonment, and not to the discharge of the contract."

The first general insolvent law in the United States discharging the debts as well as the person of the debtor was that of New York in 1784, and later more progressive statutes had been passed in 1801, 1811, 1813, 1817 and 1823. So undecided, however, was public opinion as to the value of such laws that, as late as 1819, Chancellor Kent and the judges of the New York Supreme Court in a report to the Legislature said(1):

Judging from their former experience and from observation in the course of their judicial duties, they were of opinion that the insolvent law was the source of a great deal of fraud and per-

(1) *Kent's Commentaries*, Vol. II, p. 324, note b (1st Ed. 1827).



jury. They were apprehensive that the evil was incurable and arose principally from the infirmity inherent in every such system which . . . had a powerful tendency to render him (the debtor) heedless in the creation of debt and careless as to payment . . . and probably ever must be, from the very nature of it, productive of incalculable abuse, fraud, and perjury, and greatly injurious to public morals.

Nevertheless, the commercial distresses due to the financial crises after the close of the War of 1812, and during the depreciated currency period of 1815 to 1825 caused constant pressure for relief to the debtor class. The uncertainty whether or how far the United States Supreme Court would sustain the constitutionality of State insolvent laws produced great confusion and hesitation in legislation until the final decision of the question in *Ogden v. Saunders*, in 1827. As Kent wrote, in that year: "The laws of the individual States . . . have hitherto been unstable and fluctuating, but they will probably be redigested and become more stable since the decisions of the Supreme Court have at least defined and fixed the line around the narrow inclosure of State jurisdiction." (1)

So progressive a State as Massachusetts, however, had no insolvency law until as late as 1838; but an antique and complicated system of assignments for benefit of creditors had prevailed for many years, which in its workings had proved most unjust and productive of fraud. (2) Creditors raced for the property of their debtor; a general assignment protected only those creditors who assented to it; and fraudulent assignments intended to benefit the debtor rather than to protect his creditors were the rule.

In 1831, Charles Jackson, Samuel Hubbard and John B. Davis were appointed Commissioners to consider the subject of an insolvent law and they prepared a draft. For seven years, however, the Legislature failed to take any favorable action. After the great financial panic of 1837, the general distress among debtors was so great that the State enacted this law, which proved so excellent and so liberal that it served as a model for similar acts in other States and for future United States bankruptcy statutes.

By 1845, most of the States had enacted insolvent laws; but there was great diversity in the extent to which these laws were

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(1) *Kent's Commentaries*, Vol. II, p. 326, note a (1st Ed. 1827).

(2) See for graphic description of actual conditions, *Law Reporter*, Vol. II (1839).

operative. Thus in Maine, New Hampshire, Virginia, and Kentucky, they were confined to debtors charged on execution. In New Jersey, Delaware, Maryland, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Illinois, they extended only to debtors in prison on mesne or final process. In New York, Massachusetts, Connecticut, Rhode Island, Pennsylvania, Ohio, Indiana, Missouri, and Louisiana, they extended generally to debtors in or out of prison.

In some of these States, like New Jersey, Connecticut, Ohio, and others, the laws were insolvent laws in the old technical meaning of the term i. e. laws discharging the debtor from imprisonment only. In other States, like Massachusetts, New York and others, these laws though termed insolvent were really bankrupt laws, in that they discharged the debt itself.(1)

Kent thus described the confused condition as late as 1840:

The Commissioners appointed to revise the civil code in Pennsylvania, in their Report in Jan., 1835, complain in strong terms of the existing state of things. Congress will not exert their constitutional power and pass a bankrupt law, and no State can pass a bankrupt or insolvent law except so far as regards its own citizens; and even then, only in relation to contracts made after the passage of the law. Foreign creditors and creditors in other States cannot be barred, while State creditors may be. The former preserve a perpetual lien on after acquired property except so far as the statutes of limitations interpose. State bankrupt and insolvent laws cannot be cherished under such inequalities.

It was to remedy this condition of affairs that, after a thirty years' struggle, Congress finally enacted the National Bankruptcy Law in 1841, which went into effect Feb. 1, 1842, and was repealed in 1843. It was however much more extended in its provisions than the earlier National Bankruptcy Law of 1800 and than the English bankruptcy acts, as it was not confined to "traders" and also included cases of voluntary application.(2)

The enactment of this law was largely due to the great distress following the panic of 1837 and President Tyler's veto of the Bank Act. There had been tremendous expansion of credit and speculation by private individuals as well as by the States

(1) See *Kent's Commentaries*, Vol. II, p. 394, (5th Ed. 1844).

(2) See *Griswold v. Pratt*, 9 Metc. 16 (1845) for a good description of the history of bankruptcy and insolvency legislation and the reasons for and against it in the United States and in Massachusetts.

themselves, especially in the South and West. The rage for railroad building, 1830-1840, and the numerous subscriptions by means of State stock and bond issues made by the States to induce railroad construction had piled up State debts to such an extent that many States had repudiated their obligations.(1)

In this period, the position of the debtor class was still further alleviated by the gradual adoption of statutes abolishing the old harsh system of imprisonment for debt.(2) Such imprisonment had already been abolished outright by Kentucky in 1821 and by New York in 1831. Four States, Maine, New Hampshire, Massachusetts and South Carolina soon abolished imprisonment for debts of sums less than \$5 to \$30. Statutes practically abolishing imprisonment for debt were passed in Vermont, Ohio and Michigan in 1838, in Alabama in 1839, in New Hampshire and Tennessee in 1840, in Pennsylvania and Connecticut in 1842. By the year 1857, when Massachusetts by statute provided that, "imprisonment for debt except in cases of fraud is hereby abolished forever", practically all the States had enacted this relief to debtors.(3)

Another step in advance for the protection of debtors was the enactment of homestead laws exempting from execution a homestead for the shelter and protection of the family occupying it. The first of these liberal statutes was passed by the Re-

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(1) The first instance of the use of the term "repudiation" was in an official message of the Governor of Mississippi advising this course. In 1853, by decision of the Supreme Court of the State, Mississippi was forced to pay its repudiated bonds. See *Law Reporter*, Vol. XVI.

See also *Repudiation*, by Benjamin R. Curtis—*North Amer. Rev.*, January, 1844.

As George Ticknor wrote May 30, 1842:

"Large portions of the country are suffering. At the South and Southwest where individuals and States borrowed rashly and unwisely there is great distress. To individuals the Bankrupt Law is bringing appropriate relief. But to States the process must be more slow. Some of them like Illinois and Indiana never will pay. They have not the means and cannot get the means. They are honest and hopeless bankrupts and will do what they can. Others like Mississippi which repudiate its obligations so shamelessly will be compelled to pay by the force of public opinion. . . . The lesson will have been an useful one."

(2) Kent wrote in his *Commentaries*, in 1827: "The power of imprisonment for debt in cases free from fraud seems to be fast going into annihilation in this country, and is considered as repugnant to humanity, policy and justice."

The constitutionality of State laws abolishing imprisonment for debt was upheld in *Mason v. Haile*, 12 Wheat 370, in 1827.

(3) See McMaster's *History of the United States*, Vol. VI.

See *Imprisonment for Debt*, by Asa Kinne (1842).

*Kent's Commentaries*, Vol. II, (5th Ed. 1844).

public of Texas in 1836; the next, by Vermont in 1849. Most of the other States soon enacted such laws.(1)

But it was not only by statutes that the law showed its tender side towards debtors. The trend of judicial decision was distinctly favorable to them.

Thus Kent in 1844 said(2):

In noting the vacillating and contradictory decisions on the point of the validity of voluntary gifts and conveyances of property by persons indebted at the time, it is painful to perceive, in so many instances, the tendency to a lax doctrine on the subject. The relaxation goes to destroy conservative principles and to commit the sound, wholesome and stern rules of law to the popular disposal and unstable judgment of jurors.

Another instance of the tenderness of the new law towards the interests of debtors is to be seen in the growth of the doctrine of implied warranties on sales of personal property—a development which Kent said,(3) “trenched deeply upon the plain maxim of the common law, caveat emptor; and I cannot but think that the old rule and the old decisions were the safest and widest guides; and that the new doctrine. . . . will lead to much difficulty and vexatious litigation in mercantile business.”

In still another form, the debtor was protected through the relaxation by the courts of Massachusetts and of several other States of the old English law that a sale of chattels without delivery was conclusive evidence of fraud upon creditors.

“This tendency”, said Kent, “is greatly to be regretted.

. . . Since the remedy against the property of the debtor is now almost entirely deprived of the auxiliary coercion intended by the arrest and imprisonment of his person, the creditor’s naked claim against the property ought to receive the most effective support and every rule calculated to prevent the debtor from secreting or masking it to be sustained with fortitude and vigor.”

#### LABOR LAW.

The bare rudiments of legal protection to a class which had hitherto received little protection from the law—the laboring class—developed in this era, although even by 1860 very slight

(1) *Law of Homestead*, by Seymour D. Thompson.

(2) *Kent’s Com.*, Vol. II, p. 442 note, (5th Ed. 1844).

(3) *Kent’s Com.*, Vol. II, p. 479 note, (5th Ed. 1844).

recognition to the rights of the laborer had been shown by the courts.

Three early cases in inferior courts in New York and Pennsylvania (1) had held that associations of workmen to raise prices or wages were illegal in themselves; but this stringent Common Law doctrine was overturned in Pennsylvania as early as 1821 in *Com. v. Carlisle* (Brightley's Reports 36); and in the great leading case of *Com. v. Hunt* in Massachusetts in 1842 (4 Metc. 14). This case involved the legality of the acts of the labor organization of the Journeymen Bootmakers Society, and was argued by Attorney General James T. Austin against Robert Rantoul, Jr. Chief Justice Shaw delivered one of his greatest opinions, upholding the right of laborers to combine for proper purposes without being liable to indictment for criminal conspiracy. A case in New York, in 1835, arising under a special statute had been decided to the contrary—*People v. Fisher* (14 Wendell 1). (1)

An earlier labor case in Massachusetts, in 1827,—*Boston Glass Manufacturing v. Binney* (5 Pick. 425) argued by William Sullivan and Samuel Hubbard against Lemuel Shaw had involved the question of liability for enticing workmen from the plaintiff's employ.

These cases and those cited in the notes were practically all the labor cases in the country which occurred prior to 1867. (2)

#### MARRIED WOMEN.

The change in the attitude of the law during this period towards the status and rights of married women was very remarkable.

The first liberal step in breaking down the harsh Common Law doctrine as to the legal identity of husband and wife was in Mississippi, in 1839, by the passage of a statute allowing to a wife

(1) *Boot and Shoemakers of Philadelphia*. See Pamphlet Report in 1806.

*People v. Melvin*, 2 Wheeler's Criminal Cases 262 (N. Y.), in 1824.

*Journeymen Cordwainers of Pittsburg*. See Pamphlet Report in 1811.

*Journeymen Cordwainers of New York*, in 1810. See *Sampson's Discourse*, by Pishey Thompson (1826).

(2) See also *Journeyman Tailors of Philadelphia*. See Pamphlet Report (1827).

*Hartford Carpet Weavers*. See Pamphlet Report (1836).

(3) See *Bowen v. Matheson*, (14 Allen 499) in Massachusetts, in 1867; and *Stevadore's Association v. Walsh* (2 Daly 1) in New York, in 1867.

separate ownership of property. Massachusetts followed, in 1845, by an act authorizing a married woman to hold property to her separate use by express ante-nuptial agreement(1); and by statutes in 1855 and 1857 in that State, the rights of married women were extended so as to give them unrestricted authority to hold property, to contract, to convey and otherwise to act like a *feme sole*.

Between 1844 and 1860, twenty-one States had enacted similar legislation, although few of them had granted as great freedom to the wife as had Massachusetts.(2) The first American law book on the subject, since Judge Tapping Reeve's book on *Domestic Relations*, appeared in 1861—William H. Cord's *Treatise on Legal and Equitable Rights of Married Women*. As late as 1871, Bishop in his *Law of Married Women* says: "No first class text book has ever been written upon the subject." (3)

#### CRIMINAL LAW.

The chief advances in criminal law during this period were in the abolition of the death penalty for many crimes; the reform and amelioration in the sentences and in the methods of treatment in prisons and reformatories; and the change in the law of evidence giving the defendant the right to testify.

Among the new doctrines of criminal law established by the courts, the one of chief importance was the settlement of the law as to insanity as a defence—in England by *McNaughten's Case* in the House of Lords in 1843(4)—in the United States by two

(1) See *Beal v. Warren*, 2 Gray 457 (1854).

(2) For a history of the spread of legislation of this nature, see Bishop's *Law of Married Women*, Vol. II (1875); *Willard v. Eastham*, 15 Gray (1860); and *Lord v. Parker*, 3 Allen 129 (1861).

(3) The only books other than the above written previous to 1871 on the subject were as follows—all English:

*Baron and Feme* (1700).

*Law of Marriage and other Family Settlements*, by Edward G. Atherley (1813).

*Essay on Equitable Rights of Married Women*, by James Claney (1819).

*Law of Property arising from Relation of Husband and Wife*, by R. S. Donniston Roper (1820).

*Rights and Liabilities of Husband and Wife at Law and in Equity*, by John F. MacQueen (1849).

*Law of Property as arising from the Relation of Husband and Wife*, by S. S. Bell (1849).

(4) Even as late as 1827 Lord Tenterden had said in *Brown v. Godrall* (3 Carr. and Payne 30) that "No person can be suffered to set up his own lunacy as a defense" in a civil action.

See also article on *Insanity*, in *Western Jurist*, Vol. IV.

famous cases; one in Massachusetts in 1844, *Com. v. Rogers* (7 Metc. 50), G. T. Bigelow and G. Bemis being counsel and Chief Justice Shaw delivering one of his most notable opinions; the other in New York in 1847, *People v. Freeman* (4 Denio 29) in which William H. Seward established his legal reputation by his brilliant defence of the insane negro defendant.

## LAW OF EVIDENCE.

Perhaps one of the most necessary revolutions in the old Common Law doctrines brought about in this period was the great reform in the law of evidence—especially in the removal of the rules which barred a witness from testifying because of interest, and because of being a party.

The old Common Law bar of interest had become absurd in its application to modern trials. It resulted in many instances in the complete exclusion of the truth as to the facts of a case. In other instances, it was a direct inducement to fraud, as persons desired as witnesses, and likely to be excluded on grounds of interest made releases of their interest before the trial, only to receive a regrant of the interest so released, after the trial was over. In many directions the Legislature had removed the bar, quite illogically, as to certain classes of witnesses.

The reform in this direction had started in England in 1843 in Lord Denman's Act, which abrogated the disability of a witness for interest or infamy. This Act was spoken of by the *Law Reporter* in 1844 (Vol. VI) "as justly regarded as the greatest innovation of the day", and termed by Brougham "the greatest measure under the head of judicial procedure since the Statute of Frauds". New York followed this with an act, in 1846, removing the bar of religious incapacity from witnesses, and, in 1848, the bar of interest. Connecticut passed a similar act in 1848.

One further step remained to be taken—the removal of the unreasonable disqualification, as witnesses, of parties to the suit. This reform was bitterly antagonized by the Bar for many years, chiefly on the ground that it would be a tremendous inducement to perjury. England again led the way by the passage of Lord Brougham's Act in 1850.<sup>(1)</sup>

By statute of 1851 known as the Practice Act (substantially

(1) See article on *Law of Evidence* in *Southern Law Review*, N. S. (1875).

*Disqualification of Parties as Witnesses* in *American Law Register*, Vol. V (1856-57) saying,

a Code of Civil Procedure), Massachusetts allowed the filing of interrogatories to parties to a suit and abolished the bar of interest and infamy. In 1853, Ohio adopted in full the provisions of Lord Brougham's act. Connecticut followed suit in 1854; Massachusetts, in 1856; and New York, in 1857.

In 1864, Maine became a leader in this department of the law by allowing defendants in criminal cases to testify. Massachusetts soon passed a similar statute in 1866, and New York, in 1867. Gradually this reform became general over the United States.(1)

It would be interesting to trace the effect on the doctrines of substantive law, of this exclusion from the witness stand of parties who had the chief and the best knowledge of the facts in conflict. That the substantive law was considerably moulded by the conditions imposed by this rule of evidence, there can be no question. The subject may be a fruitful one for some writer of legal history.(2)

#### LAW REFORM.

This period was peculiarly one of Codification and statutory revision, due to influences which produced an ardent agitation of these reforms in the fifteen years prior to 1830. These influences were; the hostility in the United States towards the English Com-

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"We rejoice to see the spirit of reform is at work."

See a brilliant and interesting series of articles in *American Jurist* Vols. I to XIII (1829-1835) advocating these changes in the law of evidence. See also article in 1851 in the *Law Reporter*, Vol. XIV; and also articles in the same volume explaining the workings of the new English Act of 1850.

(1) See *A Chapter of Legal History*, by James B. Thayer, *Harvard Law Review*, Vol. IX (1895).

(2) A minor illustration may be given of the results of this rule of evidence as applied to the development of modern economic conditions. In 1846, when railroad law was being formulated every day in the courts, as a new branch of law, a plaintiff failed to recover against a railroad company for loss of his baggage due to the railroads negligence, simply on the ground that he alone knew what was in his trunk and yet he was barred from testifying, because a party. The court said:

"The question whether the plaintiff was a competent witness is of much practical importance to the community, as in consequence of the facilities for traveling, the passenger travel is constantly on the increase and railroad companies being carriers of passengers and baggage are liable by the rules of common law for losses. . . . But the law of evidence is not of a fleeting character."

To counteract this decision (*Snow v. Eastern R. R. Co.*, 12 Metc. 44) the Legislature of Massachusetts was compelled by public opinion to pass an act (St. 1851 c. 147) allowing a passenger to put in evidence his own schedule or written descriptive contents of his trunk [See *Harlow v. Fitchburg R. R.*, 8 Gray 237 (1857)].



mon Law; the prejudice against special pleading, as the great bulwark of the exclusive pretensions of the lawyer class; the success of the Code Napoleon in France; the increasing multiplicity of law reports; and the powerful and spreading effect of the doctrines of Jeremy Bentham, especially through the works of his disciple in the United States, Edward Livingston.

The first step towards Codification was taken by New York in its Revised Statutes of 1828, which entirely reconstructed the law of Real Property and other topics. In 1833-34, Salmon P. Chase published a remarkably able *Revision of the Statutes of Ohio*.

In 1834-36, Pennsylvania revised its statutes, so thoroughly as practically to construct a Civil Code. In 1835, Massachusetts enacted its Revised Statutes, which served as a model for many other States in succeeding years. The original Commission appointed for this revision consisted of ex-Professor Asahel Stearns, Professor John Hooker Ashmun, and ex-Judge Charles Jackson. The next year, 1836, Massachusetts enacted a radical statute abolishing all special pleading; and in the same year, at the initiative of Governor Edward Everett, a Commission was appointed, consisting of Judge Story, Professor Greenleaf, Theron Metcalf, Charles E. Forbes and Luther S. Cushing to report on the expediency of reducing into a Code the Common Law of Massachusetts. It reported favoring a codification of certain topics; and in 1837 another Commission was appointed to report a Criminal Law Code. Part of such a Code was prepared but was never adopted by the Legislature.

In 1839, David Dudley Field began in New York his agitation for radical Code Reform; and in 1846, the new Constitution of New York made provision for two Commissions for this purpose. In 1849, a Commission consisting of Field, William C. Noyes and Alexander Bradford reported a sweeping Civil Code which failed of adoption in that State, although it was adopted by other States, after 1865.

In 1848, however, the New York Code of Civil Procedure, reported by a Commission consisting of Field, David Graham and Asphaxed Loomis,—a measure “undoubtedly the greatest innovation upon the Common Law which was ever effected by a single statute” was enacted. Within five years, similar Civil Codes based upon this statute were enacted in seven other States. In 1851, Massachusetts enacted its Practice Act which in many respects

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*The New York Code of Procedure*, by Joseph S. Auerbach (1877).

changed the old law as completely as did the New York Code, although in a limited direction.(1)

#### AMERICAN LAW BOOKS 1830-1860.

This period was one of great activity and of splendid productiveness by the American law writers. Chief, of course, of all legal works were the great series of commentaries on the law written by Judge Story and which appeared as follows: *Bailments* (1832); *Constitutional Law* (1833); *Conflict of Laws* (1834); *Equity Jurisprudence* (1836); *Equity Pleading* (1838); *Agency* (1839); *Partnership* (1841); *Bills of Exchange* (1843).

Other works of enduring importance may be mentioned as follows, (though no attempt is made to give a complete list).

In 1832, appeared *Angell and Ames on Corporations*—the first American work on this subject; and in the same year. Judge James Gould of the Litchfield Law School published his famous book on *Pleading*.

In 1838, Francis Hilliard published his *Real Property* which largely replaced *Cruise's Digest* with American lawyers.(1)

In 1837, Timothy Walker published his *Introduction to American Law*, which for many years was used at a text book for American law students. In the same year, Willard Phillips published the first complete book on *Patents*.

In 1839, appeared Bouvier's famous *Law Dictionary*.

In 1842, came the first volume of *Greenleaf on Evidence*.

In 1847, *Sedgwick on Damages* appeared—the first book on the subject in the whole history of law excepting only a "slender and shadowy book of Sayers (London 1770)."(1)

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*Historical Development of Code Pleading*, by Charles M. Hepburn (1897).

*The Common Law*, by Charles P. Dale, (1896).

*Life and Services of Salmon P. Chase*, by J. W. Shuckers (1874).

*David Dudley Field and his Work*, in *N. Y. Bar Assn. Proc.*, Vol. XVIII.

*A Century of Judge Made Law*, by W. B. Hornblower in *Col. Law Rev.*, Vol. VII (1907).

*Law Reform in the United States and its Influence Abroad*, by D. D. Field in *Amer. Law Rev.* Vol. XXV (1891).

*Revised Code of Pennsylvania*, *Amer. Quart. Rev.* Vols. XIII and XIX (1833-36).

*Revision of the Laws of Massachusetts*, *Amer. Jurist*, Vol. XVII (1835).

See also Articles on *Law Reform* in *Amer. Jurist* Vols. XV, XVI and XVII; *Law Reporter*, Vols. XI, XII, XIII, XVIII, XIX, XXV.

See also articles as to the early agitation for Codification in *North Amer. Rev.* Vols. VII, VIII, XV, XVII, XVIII, XX, XIX, XXII, XXIV; and in *Amer. Quart. Rev.*, Vols. I, VI.

(1) See review in *Law Reporter*, Vol. IX.

In 1849, appeared *Angell on Carriers*, the first book to treat of the subject of railroads.

In 1853, Professor Theophilus Parsons of the Harvard Law School issued his famous work on *Contracts*; and in 1856, his *Elements of Mercantile Law*, and in 1859, his *Maritime Law*.

In 1857, came the first book devoted to Railway Law, Edward L. Pierce's *American Railway Law*—"the first book of the kind on a subject of increasing interest," said the *Law Reporter* (Vol. XX); and the next year, 1858, Judge Redfield issued his valuable book on *Railways*.<sup>(1)</sup>

In 1857, Causten Browne's *Statute of Frauds* was published—the first book on the subject since Roberts' in England, fifty years before.

In 1860, Emory Washburn, Professor at the Harvard Law School published his *Real Property*.<sup>(2)</sup>

A group of three law books of great importance in their time were devoted to a legal topic, now happily obsolete—the law of slavery: *A Practical Treatise on the Law of Slavery* by Jacob D. Wheeler, issued in 1837; *Law of Freedom and Bondage in the United States*, by John C. Hurd, and *Law of Negro Slavery in the United States*, by T. R. R. Cobb, the two latter books appearing in 1858, only four years before, by the emancipation of the slaves, all books of law on the subject became unnecessary.

It may be of interest to note that several legal magazines flourished during this period; the *American Jurist*, at Boston, from 1829 to 1842; the *Law Reporter*, at Boston, from 1838 to 1866; the *United States Law Intelligencer and Review* at Providence, from 1829 to 1832; the *Western Law Journal*, at Cincinnati, from 1843 to 1853; the *American Law Register*, at Philadelphia, from 1852 to 1861 (Old Series); and the *American Law Magazine* at Philadelphia from 1843 to 1845.

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An article in *American Law Register*, Vol. II, in 1853-54, on the case of *Hadley v. Baxendale*, treats the law of damages as a new branch of law, saying:

"Among the interesting questions which are daily arising in our courts of law we may certainly rank those which relate to the measure of damages awarded to the successful party in an action."

(1) In 1851, a collection of *The Railroad Laws and Charters of the United States* had been issued—see review in *Law Reporter*, Vol. XIV.

(2) In a review of Vol. II of this work, published in 1862, the *Law Reporter* (Vol. XXV) quotes the *London Law Magazine and Law Review* as saying:

"We envy our American brethren the possession of such a work for we have none like it."

## CHAPTER XXXVI.

### THE WAR PERIOD 1860-1869.

As the "Irrepressible Conflict" drew nearer and nearer, not only the students but also the Professors of the Law School took an active interest in the politics of the day; and in December, 1860, all three Professors joined in the futile attempt to avert the threatened disruption of the Nation, through the movement for the repeal of the so-called "Personal Liberty Laws" of Massachusetts and other Northern states.

The enactment of these Personal Liberty Laws had resulted from a dictum in Judge Story's opinion in *Prigg v. Pennsylvania* (16 Peters 539), in 1842; "that State magistrates may, if they choose, exercise that authority unless prohibited by State legislation",—the authority referred to being to assist in the execution of the Federal Fugitive Slave Act of 1793.

Acting on this intimation, statutes were passed in Massachusetts in 1843 and in various other States, prohibiting the judges, sheriffs, and other State officers from arresting or aiding in the arrest or imprisonment of any person claimed as a fugitive slave. After the passage of the Fugitive Slave Act of 1850, and owing to the excitement caused by the arrests of fugitive slaves in Massachusetts, and especially by the action of Judge Edward G. Loring, that State passed an act, in 1855, prohibiting any judicial or civil officer and any member of the militia in the State, from participating in any way in the arrest or imprisonment of any person claimed or adjudged a fugitive. The act also provided a trial by jury in the State courts and the privileges of a writ of habeas corpus to all such persons—provisions which were in direct conflict with the Federal Law. In 1858, the militia was exempted from this prohibition; but in 1859, the Legislature still further interfered with the execution of the process of the United States Courts, by authorizing or requiring the State judges to issue a writ of habeas corpus commanding the sheriff to take the person claimed as a fugitive out of the custody of the person or officer holding him.

Many prominent Northern men deemed such legislation an

unnecessary and unjust irritant to Southern feeling; and in December, 1860, at a meeting of State Governors in New York—Washburn of Maine, Banks of Massachusetts, Morgan of New York, and Yates of Illinois, Republicans; and Sprague of Rhode Island and Packer of Pennsylvania, Democrats—it was agreed to recommend the early and unconditional repeal of these laws. An especially strong effort for such repeal was made in Massachusetts; and ex-Judge Benjamin R. Curtis prepared and issued, in December, 1860, an *Address to the People of the State* signed by a select body of men of known probity, disinterestedness, and weight of character, such as Chief Justice Shaw, ex-Governor John H. Clifford, Joel Parker, Theophilus Parsons, Emory Washburn, ex-Governor Henry J. Gardner, Jared Sparks, and many others equally prominent.<sup>(1)</sup>

Professor Parker also contributed a series of letters to the *Boston Journal*, beginning December 25, 1860, and ending January 28, 1861, dealing with the subject of the *Personal Liberty Laws of Massachusetts*, in which he considered the influence which produced them, their history and purpose; and he vigorously maintained their absolute unconstitutionality. To a criticism that he, as Commissioner to revise the statutes, had embodied them in the recent General Statutes of the State, he replied, that as such Commissioner he had no power to pass upon doubtful questions of constitutional law, but was forced to take the statutes as he found them. He closed the last of these powerful letters by an appeal to Massachusetts, "as a question of right and conscience", to repeal these laws, earnestly urging that on the action of the Legislature might "depend the question of the final dissolution of the Union". "This practical nullification", he said, "is a wrong done to the Slave States, excused in some measure, as has been said, by the repeated outrages in those States upon citizens of the Free States; but not thereby justified". He pointed out the danger of alienating other States now in sympathy, declaring that if Massachusetts "stolidly reposed on her rights as an independent State", it might lead the Middle Atlantic States and the Border States, to make some compromise with the South.

That Judge Parker and Judge Curtis were entirely right as to the illegality of these laws, there will now be no question; but at that heated time, eminent lawyers like Dana were found to

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(1) *Life and Writings of B. R. Curtis*, Vol. I.

argue to the contrary. Aside from their unconstitutionality, these laws constituted the height of political folly, in that they justified the South in its claim that, by such legislation, the Northern States were practically taking the attitude of attempting to nullify the law of the United States to precisely the same degree and in exactly the same manner as South Carolina had done in her statutes imprisoning free negroes.

The position taken by the Law School Professors, and by Judge Shaw and Judge Curtis, was, however, in the light of subsequent events, wholly impracticable. By January, 1861, the time when any compromise or temporizing attitude might have averted the breach had gone by; and it is not to be wondered at that this proposed sop to the South found little favor among the more radical Republicans of the North.

Professor Parker followed up his letters on the *Personal Liberty Laws* with a series of powerful letters to the *Boston Journal* February 4,—25, 1861 on *Slavery in the Territories*, which embodied a keen dissection of the Dred Scott case. These letters, as embodying the views of the Harvard Law Faculty on the great question of the constitutional right of Congress to legislate as to slavery in the territories were widely quoted, and were of great influence in the community.(1)

After Lincoln's election in the fall of 1860, the Southern students at the School had begun to leave, and before the date of the attack on Fort Sumter, April 12, 1861, many had gone.

The official figures show the beginning of the movement. In 1859-60, the number of students at the opening of the fall term was 166, the average number in attendance during the year, 161, from 26 of the United States, the District of Columbia, the Isthmus of Panama and France. The number at the opening of the fall term in 1860-61 was 157, and the average number during the year 148, from 24 of the United States, the District of Columbia, and New Brunswick.

The friendly relations between the students from the different sections of the country, however, continued pleasant, despite the

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(1) Those interested in the decision of the United States Supreme Court in 1900, in the *Insular Cases*, will find in these letters a very keen legal discussion of the position taken by Chief Justice Taney in 1856, and by the anti-Imperialists in 1898, that the Constitution extended, at once and ipso facto, to territory acquired by the United States. This doctrine Parker vigorously controverted both as a legal and historical proposition.

heat of sectional passion in the outside world. An eloquent appeal to exert all their influence towards political harmony was made to them by Professor Washburn at the close of the first term, January 11, 1861.

It had, for some years, been the custom of the Professors to devote a portion of the closing lecture of each term to the consideration of topics of a less technical nature than those usually discussed in the lecture room; and Washburn's lecture was on *Professional Training as an Element of Success and Conservative Influence*.

In sincere and affecting terms, he urged the necessity of courtesy and fairness in the discussion of the questions which were alienating the South from the North, and he brought home this doctrine directly to the young men before him:

If you ask me who is to do this—who can hope to check this flood of passion and ill blood that is threatening to blight the fair land, I answer, you, and everyone of you, if you will but lend your hand to the work. You have been training your minds to see that there are two sides to every case; that there may be earnestness of discussion, without involving passion and bitterness of spirit.

The students, greatly impressed by the address, requested its publication; and to a Committee consisting of Michael W. Robinson, Edwin H. Abbott, and Henry A. White, Professor Washburn replied explaining the purposes of his lecture:

It was rather the impulse of feeling, than the result of much reflection, that led me to go beyond the limits of the few parting words of counsel and encouragement which the close of the term and the departure of many of the members of the School seemed to call for, and to remind them of the solemn duties and responsibilities which they were about to assume as citizens and as members of the profession which they had chosen especially at this eventful crisis.

It seemed to me to be a fitting occasion to impress upon their minds what I regard as a solemn truth, that it requires only the same spirit of courtesy and forbearance, the same appreciation of and respect for the rights and opinions of those who stand opposed to each other as citizens, which advocates, trained in the discipline of our profession, extend to one another in the controversies in which they are called to engage, to correct this acrimony of feeling and harshness of language which render local and sectional differences in our country so irritating and alarming. I

was especially encouraged to attempt this by the condition of the School itself. I found upon its catalogue for the present year the names of 252 young men gathered here from 29 of the States of the Union. You yourselves represent localities as remote as Missouri, Massachusetts and California. I found that of these, 66 had their homes in 13 of the States, the District of Columbia included, in which that system is a recognized domestic institution which has been so fruitful an element of alienation between the different sections of our country. And yet, amidst the excitement which has been agitating the public mind outside of these walls, everything within them has been characterized by calm and dispassionate harmony and good will. It was not because these young men were not familiar with the causes of this agitation, nor was it that they did not share deeply in the feeling which prevailed in the several sections of the country with which they were connected. It was in the first place, because they were so situated here that they could not fail to perceive that there were two sides to the question in controversy and were able to apply other tests to its merits than that of mere feeling. In the next place, their training here and elsewhere, as gentlemen, taught them to regard the opinions of others, and this was aided by that habit of investigation which they had been cultivating as part of the mental discipline of the School. Added to this, there were numerous ties of common sympathy which had naturally grown up between them—such ties as, but for the mischievous interference of rash and wicked men, might still bind our whole country together, under the influence of which, and the other causes which I have suggested, a spirit of forbearance and self respect had been cherished which rendered their intercourse with each other pleasant, and, may I not hope, their connection with the School at the same time pleasant and profitable.

It seemed to me that if these habits of thought and self discipline were carried with them into active life, they might exert a power and an influence over the opinions and feelings of others which in this day of rash and inconsiderate action in all parts of our country, would tell upon the future of its history.

. . . And I greatly mistake if the sentiments which have been received with favor by you and those whom you represent will not find a cordial response wherever they meet the eye of a student of Harvard Law School, and will awaken some of these pleasant memories which I trust will be among the treasured fruits of their connection with it who during the term just closed have placed my associates and myself under a grateful sense of their uniform diligence, courtesy and kindness.

Before the Law School re-assembled for its second term at the close of the winter vacation, all hope of a peaceful outcome of the differences between the States had been abandoned. By the end



of February, 1861, six of the Southern States had adopted ordinances of secession. The heat of the impending conflict had already invaded the Law School and war talk was prevalent in the debates of the Assembly to such an extent that its meetings were suspended. The position of the few Southern students who were remaining to finish their studies was no longer one of pleasant or agreeable intercourse.

A letter from Oliver Wendell Holmes to John Lathrop Motley, Feb. 16, 1861, gives an excellent description of this period of uncertainty (1) :

I am thankful for your sake that you are out of this wretched country. There was never anything in our experience that gave any idea of it before. Not that we have had any material suffering as yet. Our factories have been at work, and our dividends have been paid. Society—in Boston, at least—has been nearly as gay as usual. . . . We have had predictions, to be sure, that New England was to be left out in the cold if a new confederacy was formed, and that the grass was to grow in the streets of Boston. But prophets are at a terrible discount, and in spite of these predictions, Merrimac sells at \$1125. It is the terrible uncertainty of everything—most of all, uncertainty of opinion of men, I had almost said of principles. From the impracticable Abolitionist, as bent on total separation from the South, as Carolina is on secession from the North, to the Hunker or Submissionist, or whatever you choose to call the wretch who would sacrifice everything, and beg the South's pardon for offending it, you find all shades of opinion in our streets. If Mr. Seward or Mr. Adams moves in favor of compromise, the whole Republican party sways, like a field of grain, before the breath of either of them. If Mr. Lincoln says he shall execute the laws and collect the revenue though the heavens cave in, the backs of the Republicans stiffen again, and they take down the old Revolutionary king's arms and begin to ask whether they can be altered to carry minie bullets.

In the meantime, as you know very well, a monstrous conspiracy has been hatching for nobody knows how long, barely defeated, in its first great move, by two occurrences—Major Anderson's retreat to Fort Sumter, and the exposure of the great defalcations. The expressions of popular opinion in Virginia and Tennessee have encouraged greatly those who hope for union on the basis of compromise; but this evening's news seems to throw doubt on the possibility of the North and the Border States ever coming to terms; and I see in this evening's paper, the threat thrown out that if the Southern ports are blockaded, fifty

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(1) *Life and Letters of Oliver Wendell Holmes*, by John T. Morse.

regiments will be set in motion for Washington! Nobody knows; everybody guesses. Seward seem to be hopeful. I had a long talk with Banks; he fears the formation of a powerful Southern military empire, which will give us trouble. Mr. Adams predicts that the Southern Confederacy will be an ignominious failure.

. . . There is no end to the shades of opinion. Nobody knows where he stands but Wendell Phillips and his out-and-outers. Before this political cataclysm, we were all sailing on as quietly and harmoniously as a crew of good Dutchman in a treckschuyt.

On April 12, 1861, came the news of the firing upon the flag at Fort Sumter. Nowhere can the atmosphere of the thrilling days that immediately followed be better felt than in the entries made by Longfellow in his diary:

- April 17, 1861—Go to town. Faces in the street are stern and serious. A crowd in the state house. At intervals drums are heard, and a red coated horseman gallops along. At the gateway of the state house two youths of twenty with smooth fair cheeks stand sentry. Ah, woe the day!
- April 18 In the afternoon, L—— who is full of fight, while I see the sadder aspect of the war.
- April 19. Walk before breakfast and hear the birds sing. Nothing is talked of but this ghastly war.
- April 20. In town. Dine with the Adirondack Club; and we talk war, war, war. Interesting but not agreeable nor instructive, as none of us know anything about it. Walked out to Cambridge with Lowell in the tranquil moonlight.
- April 21. At chapel, a war sermon.
- April 23. Weary days with wars and rumors of wars and marching of troops and flags waving and people talking. No reading but reading of newspapers.
- April 26. Sumner came out at tea, looking strong and well and very cheery in spirit. He gave us an interesting account of his narrow escape from the mob in Baltimore.
- April 27. In town. All the streets gay with flags. Dined with the Club. Sumner there; and just at the end C. F. Adams, our minister to England.
- April 30. When the times have such a gunpowder flavor all literature loses its taste. Newspapers are the only reading. . . .
- May 2. The civil war grumbles and growls and gathers, but the storm clouds do not yet break. Sumner comes out to tea. He seems rather depressed. It is indeed a



From a photograph taken about 1861.

### FIVE HARVARD PRESIDENTS.

Josiah Quincy,  
1829-45.

Edward Everett,  
1846-49.

Jared Sparks,  
1849-53.

James Walker,  
1853-60.

C. O. Felton,  
1860-62.



heavy atmosphere to breathe—the impending doom of a nation!

- May 9. In the afternoon with Felton to the arsenal to see the students drill—a dress parade. As the mayor did not arrive, Felton and I were requested to review them!—which we did, by marching up and down in front and rear.
- May 18. In town. The “Corner” looks gloomy enough. Business at a standstill. So much for war and books.
- May 27. The days come and go with a trouble in the air and in the hearts of men.

Meanwhile, the students, both undergraduates and Law School, were taking an active part in the preparations for war. Toward the end of April, a report was prevalent in Cambridge that Confederate agents were planning an attack on the United States arsenal in that city, then located at the corner of Follen and Garden Streets. Governor John A. Andrew asked President Felton, if Harvard College could not relieve the State of the duty of guarding the arsenal by providing a guard of students. This proposition, being referred to the Faculty by the President, was eagerly accepted by some of the younger Professors, led by Charles W. Eliot, then Assistant Professor of Chemistry; and arrangements were at once made for a student guard. Professor Parsons of the Law School (whose house on Garden Street was close to the Arsenal) took especial interest in the project and roused the law students to its support.

On April 29, 1861, he wrote to President Felton:

There is reason, abundant reason . . . for a sufficient and organized guard there (the arsenal) for a good while. It would be inconvenient to the Governor to take it from the students and send over a company of militia—but the present guard cannot hold it long. Professor Eliot spoke of organizing a battalion some 300-400 strong, from the students generally. By mingling with the new men some of the older and drilled men and so arranging that no one company of 50 men should be called oftener than once a week—this might do. I have provided for bedding until the government can supply it. I have seen the Adjutant General and hope you will be able to see that things go about right at once.

What a shame—what a horror it is—that here, right in the midst of us—there should be a real need to guard the arsenal.—But such is the fact.(1)

(1) Many persons thought at the time that Professor Parsons' fears were ridiculous and imaginary, and that there was not the slightest danger of any Confederate attack on the arsenal; but the fact is otherwise.

Felton wrote to Governor Andrew, April 30, 1861, that the duty of guarding the arsenal "will be joyously undertaken and faithfully performed by the students of Harvard College; and Mr. Eliot—one of our Professors who is amply qualified for the charge—has made the most judicious arrangements both for the drill and for the watch."(1)

Charles H. Owen of Hartford, Connecticut, (who was in the Law School 1861-1863) writes to the author January 10, 1908, that during his attendance at the School he was the secret agent of the war department and of the Governors of Connecticut and New York, and that he "was required to make several reports as to the efficiency of the guard of the arsenal and on the conduct of one or two vessels in the harbor. . . . I am perfectly safe in saying that there was a definite plan of certain Confederates to destroy Union munitions of war, including the wrecking of armories and factories of weapons, and that Confederate soldiers believed to be detailed for that purpose were known to be in the neighborhood of the Cambridge arsenal, the arsenal and gunshops at Springfield, the arsenal, Colts rifle and pistol factories, and Sharp's rifle factory at Hartford and other localities. I also know that it was a matter of great satisfaction at Headquarters in Hartford and Washington to learn that these places were very efficiently guarded without demanding any considerable increase of details from the regular army. I did not know that Professor Parsons had anything to do with these arrangements until recently informed. It may have been stupid in me not to have inferred something of the sort from questions asked me about his (non-legal) capacity at the time. Incidentally, I did however come to understand that he was much respected and relied on for something especial he had been doing."

(1) The remainder of this letter (See *Harvard Coll. Archives Letters of the President*) is full of interest:

"As our young men have had but little of experience in the use of arms,—some of them none at all—and as precautions at the arsenal, as well for its security from accident as for the health of young persons employed upon night service, might be desirable, which would not be necessary in the case of experienced soldiers, we think that when undergraduates at least are on duty it would be well for the military authorities to require

1. That there should be no smoking or open lights in the buildings.
2. That no spirit of any kind should be permitted.
3. That a mattress for each man should be provided.
4. A regular supply of provisions.

We shall take care that those who have had some drilling shall go first; and the others shall be prepared as fast as possible. Mr. Eliot thinks that the present guard can be relieved by a detachment of undergraduates as early as Friday morning. Mr. Parsons suggests that a servant should be there all the time; and he has sent one today.

I daresay that some of these suggestions may appear uncalled for to a military man. I am not a military man, though I have handled a gun; but I feel very solicitous both for the absolute safety of the arsenal and for the health of the young men, many of whom never passed a night out of a comfortable bed. The exercise they will have will be very valuable to them and it will be a great gratification to know that they are rendering service to the State.

Mr. Eliot is of opinion that it will not be expedient to have a sergeant's squad connected with them. Upon reflection I think this view is correct. He has excellent officers to place on duty under Col.

The students were at once organized and detailed in companies of 42 each, each company remaining three days on duty at a time. They were officered by members of the Cadets and under command of Lieut. Col. C. C. Holmes.(1) On May 6, President Felton wrote to Adjutant General Schouler that, "our student guards have been prompt, attentive, obedient to orders, and have made surprising progress in mastering the details of military movements as far as they have had the opportunity. I believe brain makes the soldier as well as anything else. An army of educated men would sweep all before them." On May 8, he wrote: "The guard at the arsenal is very efficiently kept. The officers of the Cadets speak in the best terms of the intelligence and zeal of the young men, and they have taken great pains to make the training as thorough as possible."

Meanwhile the undergraduates and law students had organized a Drill Club which met in Brattle House, for which Adj. Gen. Schouler supplied the College with 400 muskets, William W. Greenough and others contributing \$500 to aid in defraying the expenses of this Club(2), and J. Lewis Stackpole, Amos A. Lawrence, James A. Perkins, William W. Swan and James B. Walker volunteering their services in giving military instruction.(3)

President Felton was at first opposed to this Drill Club, fearing the interruption to College work and study; but the pressure upon him from students and from their parents proved too great to withstand.(4)

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Meacham, and I doubt not everything will go in an efficient and orderly style.

The oftener the adjutant general and other distinguished officers can visit the arsenal and say a word to the young guards the better they will like it.

I cannot close without thanking your Excellency in behalf of the students for the confidence you have reposed in them, by entrusting to their hands so honorable and responsible a duty."

(1) See letter of President Felton to Adj. Gen. William Schouler, enclosing list of student guards, June 13, 1861—*Harv. Coll. Archives—Letters to the President*.

(2) See letter of President Felton to W. W. Greenough, May 1, 1861.—*Harv. Coll. Archives, Letters of the President*.

(3) See letter of President Felton to J. L. Stackpole, May 27, 1861, tendering his thanks to these gentlemen.

(4) See interesting letter from President Felton to William Fabens of Marblehead, May 1, 1861:

"Your son spoke to me today on the subject of the drill which we have recently permitted to be introduced. He thought you were under some apprehension that it might be connected with the militia of the State. I write to say that it is wholly independent of any military service which

The undergraduate and law student guard remained on duty at the arsenal for about a month. On May 31, 1861, however, Henry Lee, aide de camp to Governor Andrew, wrote to President Felton, announcing that all ammunition had been removed from the arsenal to Captains Island in Boston Harbor, and ended his letter with this acknowledgment of the service performed by the students: "The State no longer needs the services of the students as guards. I am requested by his Excellency to thank the young gentlemen who promptly offered and faithfully performed this duty."

The general condition of the College during these early days of the war was stated by President Felton in his Annual Report for 1860-61:

Though not insensible to the agitations of the times, no department of the University has for a moment ceased or slackened its appropriate labors. The general condition as to order and discipline has never been better, with the exception of a partial interruption of the studies of the young men who by request of His Excellency the Governor were detailed in succession to perform guard duty at the arsenal, the work of the several classes went on with its customary regularity; and even those lessons that were thus omitted were made up in the reviews. Two or three students belonging to military companies were allowed to be absent during the three months for which the requisition of the President was made, and a few were permitted, towards the end of the last term of their Senior year, to avail themselves of the opportunity offered them to acquire some knowledge of military drill by joining the troops stationed at one of the forts in Boston

the State can claim. We shall never allow a company to be enrolled, as I am sorry to see they have at some of the colleges for the purpose of offering them for the war. We consider our young men simply as students in training for their future careers. But there is such a war fever in the community and so great a probability, as some think, of a long war in which many of our youth may be called out by the country, that we thought our most prudent course would be to let them have a drill under such regulation that their studies should not be interfered with.

The Governor has also requested us to allow the students to protect the arsenal as "a guard of honor." We have consented, thinking it would be a good experience for the young men and a real service, as the Governor assures me it will be to the Commonwealth, since the company ordered on this duty has been called into the field. For both of these exercises we require the young men to bring their parents' or guardians' certificate that their consent is granted.

The watch at the arsenal will interrupt the studies about once a week or ten days . . . I do not advise the students to enter their names for either task. I hate war and all its works. But Milton says that a citizen should be prepared by his education to perform justly and magnanimously all the duties of peace and war."



Harbor, inasmuch as they were intending to enter the service immediately after taking their degrees. A drill was also established in place of the customary gymnastic exercises for a portion of the summer term, arms having been furnished temporarily for that purpose by the government of the Commonwealth. The drill was conducted partly by College officers, and partly by other gentlemen, who kindly volunteered their services and gave much valuable time to this subject. The general expenses of these military arrangements were defrayed by a fund contributed by a few liberal-minded friends of the College. Some undergraduates still continue in the army. Many graduates of the recent classes responded instantly to the call of the country, and are serving in the field. They are among the bravest of the brave; not one has failed, whenever opportunity offered, to show his readiness to lay down his life for his country. A cultivated intellect and the natural sense of honor, sharpened by the discipline of the University, are not only the best preparation for civil life, but for the duties and dangers of war.

During these scenes, so unusual in our academic retreats, the undersigned became deeply impressed with the importance of making more than usual efforts to carry on uninterruptedly the works of peace in the midst of war, and he and his associates insisted that no part of the College work should be left unperformed, and no one of the College festivals should be omitted. One of the greatest evils of war is the check it puts almost invariably to the progress of science and civilization; but they serve their country who continue toiling in the discovery of truth and the education of the young, no less than those who arm themselves for the field of battle; and it would be a great mistake to make any essential modifications in our colleges and schools by introducing a large element of military instruction and discipline, under the idea of adapting them to the peculiar exigencies of the hour. While it may be useful to make to some extent a military drill a part of the gymnastic training now so generally introduced, it should be remembered that the gymnastic system itself is, according to the late experience of European armies, the best physical basis for military discipline.

A law student's reminiscence of those exciting days of 1861 is given in the following letter from John D. Long (L. S. 1860-61) (1):

That spring the war came on; the streets were full of troops and enthusiastic crowds. Drill clubs were formed and the law students were in evidence in the ranks—among them I recall the figure of James Russell Lowell and the fair hair of William Lowell Putnam (both nephews of the poet.) At one time early

(1) Letter of John D Long to the author (1907).

in May, we were put on guard at the arsenal where were stored powder and other munitions of war. There was suspicion probably unfounded—of danger of incendiaries in the rebel interest. At any rate we kept a guard and took our turn in pacing up and down our sentinel beats, day and night, as if an invading force might at any moment assault us. Among us were James M. Morton (now of the Massachusetts Supreme Judicial Court), Jeremiah Smith (now Professor at the Law School) Robert D. Smith and John C. Ropes.

In the Law School itself, both Professor Parsons and Professor Parker kept the subject of the war in its legal aspects constantly before the students, and their elaborate and careful lectures, especially those of Parker, imbued their pupils with a far deeper understanding of the complicated legal problems to which the war gave rise than the outside public could obtain; although the radical differences of opinion between the two Professors on the law involved, was a source of considerable comment. Professor Parsons had a personal interest in the war, for his son had enlisted in the army; his legal advice was sought for by the Government on many occasions; and he placed at its disposition, his yacht "Eliza".

Professor Washburn, although sixty-two years old, became a member and officer of a company formed in Cambridge for such duties as might devolve on a home guard, and bore enthusiastically the fatigue of exercise and drill. By constant speeches, lectures, articles and money contributions, he showed his devotion; and his son, Emory Washburn, Jr. (U. S. 1861-62) served in the army.

One of the first of his series of war lectures was delivered by Parker in May, 1861, on *The Right of Secession*(1)—a searching arraignment of Jefferson Davis' message to the Congress of the Confederate States, and of his fallacious theory of the Constitution as a compact between States.

A few weeks later, on June 11, he gave a long lecture on the famous case of *Ex parte Merryman*, in which Chief Justice Taney had just delivered his noted opinion, ordering the writ of habeas corpus in behalf of Merryman, who had been arrested by the military authorities for complicity in the attack by the mob on the Sixth Massachusetts Regiment when passing through Baltimore. The officer in custody of Merryman, declined, on the order

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(1) Published in the *North American Review* (July 1861).

of President Lincoln, to recognize the right of the court to issue the writ and refused to produce the prisoner.

Professor Parker differed widely from Taney's views, and declared that, while the President might not in law have the right to suspend the writ of habeas corpus, yet "the existence of martial law, so far as the operation of that law extends, is, ipso facto, a suspension of the writ". There is little doubt that Parker's views were correct, and if President Lincoln had been content to rest his action on the grounds laid down by Parker, instead of claiming the right to suspend the writ as an exercise of executive power, under the "war powers of the Constitution", he would have been spared the active and bitter criticism directed against him later by many of his former staunch supporters, including Parker himself.

Professor Parsons, being less conservative by nature, delivered several lectures on *Martial Law*, in which he took more advanced ground than Parker, and declared his frank support of the President's right as military commander to suspend the writ of habeas corpus.

This was the beginning of the series of differences between the two Professors in their politico-legal views which lasted throughout the war.

On June 25, 1861, Parker delivered a lecture on the *Domestic and Foreign Relations of the United States*,<sup>(1)</sup> in which he took the position that the "insurgents stand legally as to the United States in the position of rebels and traitors, and their privateersmen as pirates"; and that an insurrection might "result in what is properly denominated as a war without losing its character as an insurrection"—and that the "parties to that war have necessarily to a certain extent the political character of belligerents."

This doctrine so laid down is of great interest as containing the gist of the famous argument made by Richard H. Dana in December, 1862, in the *Prize Cases*, and adopted by the United States Supreme Court (1 Black 635).<sup>(2)</sup>

The lecture also discussed the Mason-Slidell capture and the Trent case—to which Judge Parker devoted another long letter,

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(1) Published in the *North American Review* (January 1862).

(2) In the proceedings before U. S. Circuit Court Jan. 19, 1882, on the death of Dana. Judge E. R. Hoar said, "His arguments in the Prize cases were probably as valuable a contribution as was made by any one in civil life to the national success in the civil war."

January 17, 1862, entitled *International Law*(1), after the settlement of the affair which came so near involving the country in a war with England. In April and October, 1862, Parker contributed to the *North American Review* two interesting articles on *Constitutional Law* and *The Rebellion and the War*, in which he dealt with the legal status of the States which had seceded, and outlined his views on the extent of the powers of the President, vigorously denying the right of the latter to emancipate the slaves. The pronounced views which he had, on so many occasions, publicly given forth had now drawn down upon him the violent denunciation of Senator Sumner. There were, however, many prominent men in Massachusetts who entirely agreed with Parker in denying to the President the extensive and arbitrary powers which he had assumed under plea of military necessity. This antagonism to the Administration, and to Sumner and Governor Andrew as its representatives, grew stronger through the summer of 1862; and it was finally determined to put in nomination for State officers, candidates who should represent this more conservative element of the Republican party.(2)

A convention of about 1,500 men assembled therefore in Faneuil Hall, October 7, 1862; and while expressly resolving that they would "with heart and soul and mind and strength" support the President "in the prosecution of this war to the entire and final suppression of the Rebellion," they declined to endorse Sumner and Andrews, and nominated Charles Devens for Governor. The leaders of this movement were at once denounced as "traitors", "sympathizers with rebellion", and "guerilla bands of Jefferson Davis", the latter expression being originated by Sumner himself. In answer to these onslaughts, and especially to an attack made by a prominent Boston clergyman, Professor Parker issued on October 30, 1862, an *Address to the People of Massachusetts*.(3)

(1) Published in the *North American Review* (May 1862).

(2) Edward L. Pierce, in his *Memoirs and Letters of Sumner*, Vol. IV, says: "Ultra conservatism made its last struggle; and conspicuous among its leaders was Prof. Joel Parker, whose judicial temper was upset by Sumner's 'State Suicide' doctrine, and who combined with his abilities as jurist, antipathy to those who found more power in the Constitution to deal with slavery than he could find."

(3) In *Pen Portraits* by "Warrington," is the following illustration of the extreme bitterness of the Republicans against Parker and his followers. The article was published after the appearance of Parker's *Address*.

"There is an element of the comic in this thing in its connection

This fiery, pungent, and spicy political document should be read in its entirety to be appreciated. Of Sumner he said that :

He (Parker) had no private spite or pique to gratify, having had no personal difference with any of the candidates now before the public, until Mr. Sumner in consequence of criticisms upon his political course saw fit to make the matter personal between us. Any other gentleman is at perfect liberty to do the same, and the dispensation will be accepted with the same resignation with which his demonstrations of personal hostility have been received.

In this paper, Parker went to the extreme of calling Lincoln "not only a monarch, but that his is an absolute, irresponsible, uncontrollable government—a perfect military despotism"; and he compared him with Louis Napoleon and the Sultan of Turkey,

with Massachusetts politics. Stimulated by ancient hatred and prejudice against Charles Sumner, and by the vain hope of obtaining some little Republican help in their opposition to him, half a dozen hunkers got together the other day, and said, 'Let us prepare and load our biggest petard, and give the senator a hoist.' The work of loading the gun was intrusted to Judge Joel Parker, who was known to have a sufficiency of wadding, if his projectiles were not of the most formidable kind. So the judge sat himself down; and said he to himself and his associates, perhaps to his mathematical friend Benjamin Pierce, 'Look here. Given the problem to upset Charles Sumner, how shall we do it?' . . . The address was an easy matter apparently; you had only to use a conglomeration of words with especial care to conceal your meaning; to express opposition to Sumner, and yet say nothing about him; and so frame a document which should rope in the unsuspecting, and humbug the innocent, while to those in the secret it should be luminous with meaning. But, alas! to Judge Joel Parker, a controversy, or something like one, a hit, an innuendo, is as necessary as a breakfast to a hard-working laborer. He doubtless looked over his job in its rough draught, and said, 'It will do: and yet it will not do; for I have not hit anybody a dig. Go to: I will find a place, and I will insert something, which, while it shall do no harm, shall yet satisfy my combative sense.' And doubtless he interlined the words, 'We want no impotent proclamations now, and said to himself, 'Now I have placed my imprimatur on it, and the world will know it as Joel Parker's.' And it went forth. . . .

And while the judge was putting the finishing touch to it, perhaps even interlining the words 'impotent proclamation,' lo! Abraham Lincoln was putting words together into an 'impotent proclamation' just such as Judge Parker had solemnly declared that he did not 'want:' and, the very day after the manifesto against 'impotent proclamations' appeared, out came the identical 'impotent' one which the judge had warned the people against; . . . And the next morning the judge opened his morning paper, and looked to see further evidences of the progress of the movement; and, lo! he beheld in startling big letters (impotent) 'Proclamation of Emancipation by Pres. Lincoln.' I draw the veil over the scene, but can only hope the judge had finished his coffee and muffins before he came to that dreadful heading.

Mr. Parker is understood to have retired to his professional chair. The Law School was divided against itself. Prof. Parsons, in half a column of stirring words, did more to elect Sumner and Andrew, than Prof. Parker, by his hundred columns of sophistry, to defeat them. . . ."

asserting that hereafter there was to be no Constitution in the prosecution of the war. And he wound up by saying that :

The Republicans of Massachusetts are doing all that lies in their power to prostrate the liberties of the country. . . . The issues of the pending election are, whether, forgetting the memories of our Fathers who have transmitted to us the priceless inheritance of freedom, we will renounce those principles and that inheritance, and voluntarily and tamely trample our liberties in the dust.

In entire accord with Professor Parker's view of the law and of the legal rights of the President was Benjamin R. Curtis, whose pamphlet, issued in October, 1862, calm and serious, as it was, called down upon its author a storm of bitter attack from excited partisans of the Administration. The attitude of Parker and Curtis is well described in Curtis' *Life and Letters*.

While those who compelled Mr. Lincoln to issue the Emancipation Proclamation of Sept. 22, 1862, really cared nothing for the source of power to which it was to be referred, and while the majority of the Northern people were perhaps gratified that it had been issued, and thought little of any question of principle involved in it, Judge Curtis felt that he had a duty to fulfill. Nor was that duty made less exigent, when another Proclamation—one creating offences unknown to the laws, subjecting persons committing them, or guilty of any disloyal practice, to martial law, and suspending the writ of habeas corpus—burst upon the country, as if it were the announcement of a reign of terror;—a reign which the Secretary of War was prompt to inaugurate as effectually as force could do it, by orders establishing a military police all over the land, to act under his directions in making arrests and reporting treasonable practices.

Among the most vigorous attacks on the position taken by Curtis and Professor Parker was one made in a letter from Professor Parsons, published in the *Boston Daily Advertiser*, October 24, 1862, in which he took the extreme position that "Rebellion has no rights. No rebel has any right, a regard to which should weaken or obstruct any military measure needed to subdue the rebellion."

This reply by Parsons at once made him widely popular among the upholders of the Administration.

"Cambridge against Boston, the authoritative judgment of the unsullied patriot, opposed to the special pleading of a cotton law-

yer—public opinion in favor of the Dane Professor and on the side of humanity”, said one newspaper.

As the fall election grew nearer, Parsons became more and more absorbed in politics. The fact that his own son was fighting at the front gave him a human, immediate personal concern which, he claimed, those lacked who agreed with Parker. Nevertheless, both men were conscientious in their views and each according to his own light was teaching the noblest forms of patriotism. How radical, however, was their difference may be seen from the tone of a circular issued by Parsons to the voters of the Fourth Congressional District, November 3, 1862, three days before the election, in which he stated that if John A. Andrew was defeated, the news would carry as much joy to the rebels as if they had met and beaten in battle the regiments from Massachusetts—that there were only two parties, and that the third party was really working for the rebels.(1)

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(1) “If it had been intimated to me, a short time since, that I might become willing to enter into a political contest, and address my fellow-citizens with my pen, it would have seemed to me exceedingly improbable. Why do I this thing now? Because it is utterly impossible for more than two parties to exist this day in our country, and to one or other of these every man must belong. One of these is that party, however composed, which assists and strengthens the Government. The other is the party, however composed, which obstructs and weakens the Government. All other parties are mere pretences or nullities, except so far as they co-operate with one or the other of the two real parties. To one or other of them every man must belong; for if he calls himself neutral, and does nothing, he adds to the dead weight which the Government must drag along; and there is no need to increase their burthen.

Do you wish to know what party works with the Government and against the rebels, and what party works against the Government and with the rebels? It is easy to find this out.

Is not every one of you certain, yes, certain, that if John A. Andrew is defeated on Tuesday, the news will flash along the wires from Richmond into every corner of the Confederacy, and everywhere carry as much joy as if the rebels had met the regiments of Massachusetts and beaten them in battle? and that defeat of Samuel Hooper, the Republican candidate for Congress in our District, must produce, and ought to produce, an effect of a like kind.

If your votes give the rebels assurance that a construction of the Constitution prevails in Massachusetts which makes it put a sword in the hands of the President, and commands him to strike the rebellion, and at the same time commands him to be very careful that he does not strike rebellion to the heart, what more could you do to give aid and comfort to the rebels? If you have a son who has left your quiet home, and is now in the front of the battle, will you say to him: “My boy, do your duty! and when the charge sounds, rush upon the foe. If you cross bayonets with a rebel, prick him furiously in the arms and legs, and if you have a chance, let your steel glance along his ribs; but however he may attack you, be sure you do not thrust him through the heart, for that would be unconstitutional!” And this is the meaning of the argu-

The result of the election was the overwhelming victory of Sumner and Andrew. Undismayed, however, Parker followed up his *Address to the People* in a series of nine letters in the *Boston Post*, Nov. 11, 1862, to Feb. 16, 1863, by a keen, merciless flaying of two clergymen who had attacked his position. In the first of these letters he said:

If any of them (his protagonists) have D. D. attached to their names, that does not disqualify them from being also A. S. S. and mischief makers besides. You will say, perhaps, that it is undignified, to speak thus of dignitaries. I am almost inclined to admit it. But when one is striving to abate a nuisance, one must not stand on his dignity."

In another he indignantly maintained:

The duty of vindicating the right of gentlemen of the Bar to form their opinions upon legal subjects and especially upon the construction of the United States and to express these opinions in any manner consistent with due courtesy to others, without being subjected to censure, sneers, abuse and vituperation by a class of clergymen who assume to know more of Constitutional Law than the tribunals and officers created and constituted for the purpose of discussing and determining legal questions.

Parker's views on this subject were apparently strengthened by the attacks which were made on him and on Judge Curtis; and finally, in an address delivered before the National Club of Salem March 13, 1863, on the *War Powers of Congress and of the President*, he stated most elaborately the legal grounds for oppo-

ment addressed to you, denying the constitutional power of the President to issue his recent Proclamation.

A great man who lived in England a good many years ago, when there were great men in England, said, "When the wicked conspire, it is time for good men to unite." The wicked leaders of rebellion cling together in a conspiracy which has the solidity of steel. Is the union of our good men so loose at every joint, that it is shattered by every difference of opinion, and falls to pieces before the old party and personal hatreds which we thought were dead, when they were only sleeping to recruit their strength? I do not know how this is, but by Tuesday night I shall know.

At this hour, Constitutional Government and rebellion have met in a death struggle. Both cannot come out of it alive. Which shall die? Only the Supreme Ruler of events can answer this question. But there is another question which the hour asks of every one of us, and which every one of us may and must answer, and will answer on Tuesday. It is, which side shall I help?

Before my eyes this great question ever stands. Before all eyes it should stand. And in its fearful presence all minor questions, all old names and all old differences should disappear and die."



sition to the President's Proclamations emancipating the slaves, suspending the writ of habeas corpus, and declaring martial law. He gave especial consideration to Horace Binney's legal defence of the President, and the treatise, then recently published, entitled *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery*, by William Whiting, a prominent patent lawyer of Boston who had been made a solicitor for the War Department. The doctrines laid down in his book were sarcastically designated by Parker as "Patent War-office Constitutional Law".

Of Parker's political lectures to his students, the following sympathetic description has been given by a student in the School, Daniel H. Chamberlain (L. S. 1862-4), later Governor of South Carolina(1):

Professor Parker was one of the most remarkable men whom I have ever become closely acquainted with; and I want to say a word about him; not so much to vindicate his memory, because the day of vindication, if it ever existed is passed, but I happened to be here in the early flush of the war excitement. I listened to the constant criticisms which the old judge felt called upon to make upon the current events—upon the suspension of the habeas corpus by President Lincoln and the Emancipation Proclamation, and we thought to ourselves sometimes, that this kind of criticism was a hindrance to the great cause which was then trembling in the balance. Well, I don't know, gentlemen, but it was. I think there are times when constitutional criticism and constitutional effects must be held a little loosely, when the life of the country is at stake. But no man who remembers Professor Parker, if he doubted then, now doubts that the old man's heart was as true to his country and to the permanency of the Union as that of the youngster who criticised him. I remember a very brief anecdote. We were accustomed to ask questions, to interrupt the most learned and eloquent periods with our upstart questions, and on this occasion the judge had been alluding to the constitutional provision respecting the suspension of the habeas corpus; and one very ardent youth, who was listening and who had caught the war excitement, suddenly started up with the question, "Professor Parker, if you saw a man striking down the American flag, caught him in the act, would not you suspend the habeas corpus?"—and instantly came back the answer of the brave old man, "No, sir, I would not suspend the habeas corpus, but I would suspend the corpus."

(1) Speech at the Dinner of the Harvard Law School Association, 1891.

In March, 1863, Professor Parsons issued a pamphlet on *Slavery, its Origin, Influence and Destiny*, in which he developed the proposition that "while in my judgment the Constitution has not yet been violated in any way or to any extent greater or less, if the Constitution must be disregarded to preserve our nationality then, with as much love and reverence for the Constitution as my nature is capable of, I should still say, our nationality must not be lost, and rebellion must not prevail."

Meanwhile the Law School, notwithstanding the political activity of its Professors, was continuing its course of instruction, although with a smaller body of students. At the first term of the year 1861-62, there were 103 students; at the second or spring term the number fell to 78.<sup>(1)</sup>

The School met with a severe loss, through the death of Chief Justice Lemuel Shaw, March 30, 1861. For twenty-two years Shaw was a member of the Board of Overseers, and for twenty-seven years a Fellow of the Corporation. In 1860, he had resigned as Chief Justice of Massachusetts. To use President Felton's words<sup>(2)</sup>:

He was a scholar of liberal tastes and large acquirements; a magistrate, universally regarded as a pillar of the Commonwealth. With these high and manly powers and qualities, Judge Shaw possessed a disinterested and generous disposition, and a heart as tender as a child's. During his long life he manifested on all occasions the warmest filial devotion to the University, the mother of his mind. In the official relations which he sustained till the day of his death, he gave his time, his best thoughts, his labors, freely and unsparingly to her service. Important subjects of a business character connected with the University were among the last that occupied his intellectual faculties; and a meeting of the corporation had been appointed to be held at his house on the 30th of March, the day of his death.

His constant and detailed interest in the administration of the Law School had been particularly marked and valuable.

Francis B. Crowninshield was elected to fill the vacancy. To

(1) The following vote of the Corporation regarding one of the students, is of interest.

April 27, 1861 *Voted*, that Mr. Henry Schauffer, now preparing himself to be Professor of the Law in the American College about to be established near Constantinople for the higher education of the races that constitute the Turkish Empire, be permitted to join the Law School and receive instruction with all the other privileges of a member of the same, free of charge.

(2) See President's Annual Report, 1860-61.



**Theophilus Parsons**



offset this intellectual loss, the Law School at this time began to receive a substantial financial gain—through the magnificent Bussey bequest. Since Mr. Bussey's death, in 1842, the estate had been in the hands of trustees. On February 23, 1861, however, the Committee of the Corporation relating to the Bussey bequest, E. Rockwood Hoar and Amos A. Lawrence, reported, advising the College to take over the property from the trustees and to assume certain annuities charged upon it. They stated that the property on April 30, 1860, was valued at \$506,721.80, from which should be deducted a debt of \$30,000 and the value of unproductive land on West Roxbury of \$71,598.73, leaving a net balance of \$405,123.07; that the income was \$32,130 and annuities payable \$9,300(1). The Corporation thereupon voted to take over the property, and to constitute it the Bussey Fund, 5 per cent. interest to be allowed on income. One-half of the income was to be invested as the Bussey Institution Income Fund, the other half "to be annually appropriated for the use of the Theological and Law Schools, one-half to each respectively, in such manner as the Corporation shall direct."

On February 24, 1862, E. R. Hoar and F. B. Crowninshield were appointed as a committee to consider and report what disposition shall be made of that part of the income of the Bussey fund which is appropriated for the benefit of the Law School."

President Cornelius O. Felton died, February 27, 1862; and on April 26, Thomas Hill was elected his successor. On May 31, Hoar and Crowninshield made the following interesting report as to the disposition of the Bussey income in the Law School:

That they met the Professors of the Law School and held a full and satisfactory conference in relation to the condition and wants of that department of the University.

The language of the will of Mr. Bussey is comprehensive enough to give the widest latitude to the discretion of the Corporation in the use of the income of the fund which he appropriated for the benefit of the Law School.

It is given for "the encouragement and promotion of legal education in said college by the endowment of professorships or scholarships in the Law School; by the purchase of books, erection of buildings, and by such other means as may in the judgment of the President and Fellows render the income of the

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(1) In the Treasurer's Report (1861), the valuation is given as \$413,200.67, besides the Roxbury Estate valued at \$65,000.

property hereby appropriated most available in the accomplishment of the objects proposed."

The number of students attending the School has been materially affected by the war, and the funds belonging to it have been considerably impaired by the unfortunate investment in the Brattle House. Nearly all the resources at command will therefore be needed for the present to maintain the School in the existing state of efficiency, and we think it best to apply the income of the Bussey Fund, for the most part, to supply the wants of the Institution as now conducted, rather than to attempt to extend its scale of operations.

But the benefaction of Mr. Bussey is so large and important that we think it should not be absorbed in the current expenses of the School without something to mark the source from which it is derived, and to do honor to his name and memory. We have had this object in view in the appropriation of the fund which we recommended, and have only regarded the specific objects enumerated by him as specially contemplated in the disposal of his bounty.

The Committee's recommendation, urging a change in the name of the University Professor to that of Bussey Professor, and various other matters, were embodied by the Corporation in the following votes:

*Voted* that (1) The prizes for dissertations in the Law School shall hereafter be termed "The Bussey Prizes for Dissertations", and the sum of two hundred dollars shall be annually applied from the income of the Bussey fund appropriated to the Law School to the payment of these prizes. (2) Five hundred dollars shall be annually appropriated from the income of the Bussey fund belonging to the Law School for the purchase of books of permanent value for the Law Library; and in each book so purchased shall be pasted a label containing these words: "From the fund given by Benjamin Bussey."

(3) The University Professorship of Law shall henceforth be known and named as the Bussey Professorship of Law; and the present University Professor of Law shall henceforth be called the Bussey Professor of Law; and he shall give such lectures and instructions and upon such branches of the Law, and perform such duties in the Law School as shall from time to time by any statutes and orders be assigned to or required of the Bussey Professor of Law. Until further order, the duty of the Bussey Professor of Law and the salary to be paid to him shall be the same as those heretofore assigned to the University Professor of Law.

(4) The sum of One thousand dollars shall be annually applied toward the payment of the salary of the Bussey Professor

of Law from the income of the Bussey fund belonging to the Law School until the further order of the Corporation.

The income of the Bussey Fund not otherwise appropriated shall be annually funded as an endowment of the Bussey Professorship of Law until the further order of the Corporation.

The vote as to the Bussey Professorship was considered by the Overseers on June 19, 1862; and on that date Professor Washburn became the first Bussey Professor.

Before the inauguration of the new year of the Law School, 1862-63, the battles of Shiloh and Antietam had been fought (April 7 and September 15, 1862); the famous fight between the Monitor and the Merrimack had occurred on May 11, 1862; and on September 22, Lincoln had issued his Emancipation Proclamation.

An increase in the prosperity of the School could hardly be expected in such times, and the authorities were satisfied if the School held its own. The Professors stated in their Report of December 31, 1862, that there was no essential change except in number of students:

It was but a matter of course that the political and sectional controversies which preceded the war and which followed the financial embarrassments of 1857-8 should affect the School to some extent. But notwithstanding these adverse circumstances the number of students in the autumn term of 1859 was 175, the largest number ever in attendance at one time. The war has greatly reduced the number, partly by reason of the further embarrassments of business which always affect the Law School much more than the Academic Department, but still more through the patriotism which has induced many young men who were members of the School, and others who would have joined, to enter the army.

At the spring term of 1862, there were only 78 students; but at the ensuing fall term, the number had increased to 92, from 20 States, New Brunswick, Turkey, and Hawaiian Islands. In the spring term of 1863, the number fell to 80.

During the summer of 1863, on July 4, occurred the battle of Gettysburg, and the capture of Vicksburg. On July 18, Col. Robert <sup>Quincy</sup> Shaw fell at Fort Wagner. In this same month, on July 14, the city of Boston had been thrown into a state of great excitement by the Cooper Street draft riot. (1)

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(1) For excellent account of this, see the case of *Commonwealth v. Campbell*, 7 Allen 541 (1863).

The new academic year of the Law School, (1863-64), began with a large increase in attendance, the number rising from 80 in the preceding spring to 129; and during the second or spring term of 1864 the number was 115, from eighteen of the United States, Canada West, Canada East, New Brunswick, Nova Scotia, District of Columbia and the Hawaiian Islands.

On July 20, 1864, the Corporation and the Board of Overseers voted to appoint Edward Everett to lecture in the Law School during the next academic year upon the Law of Nations. (Everett died, however, on January 16, 1865, before entering upon his duties.) Three months later, October 16, 1864, Roger B. Taney, Chief Justice of the United States Supreme Court died, after a term of service of twenty-nine years, and Salmon P. Chase became his successor.

The growth in the attendance at the Law School during 1864-65 showed the approaching close of the war; and the School opened with 138 students, thus "reaching the full average of the attendance prior to 1859"—so the Law Faculty reported, December 28, 1864. At the next spring term of 1865, there were 131, from 23 States, the District of Columbia, New Brunswick and Nova Scotia.

February 1, 1865, was memorable in the annals of lawyers for the admission to practice before the Bar of the United States Supreme Court of the first negro lawyer, G. S. Rock, his sponsor being Charles Sumner.

On April 9, 1865, General Lee surrendered to General Grant at Appomattox, and on April 14, President Lincoln was assassinated.

On July 21, 1865, occurred Commemoration Day at Harvard—the most notable celebration in the history of the College. The exercises were held in the Unitarian Church, and there James Russell Lowell delivered his famous Commemoration Ode, and Rev. Phillips Brooks his wonderfully eloquent prayer. At the dinner given in a large pavilion at the rear of Harvard Hall, addresses were made by General Francis C. Barlow, General Charles Devens, General William F. Bartlett, Governor Andrew, President Thomas Hill, Major General Meade, Rear Admiral Gherardi Davis, Ralph Waldo Emerson and others; and there were poems by Dr. Oliver Wendell Holmes and Mrs. Julia Ward Howe.

With those who attended the College and the Law School



during these stirring years of the war, the memory of events is ineradicable. Perhaps the most vivid résumé of the general impressions produced upon the student of those days is that given by Moorfield Story who graduated from the College in 1866 (L. S. 1866-67) (1):

When the members of my class first presented themselves in July, 1862, the darkest days of the war were upon us. The Peninsular Campaign with its heart breaking delays, its desperate but ineffectual battles, its ultimate failure was just ended. Cedar Mountain and the Second Bull Run were to come. On Bloody Monday night, while we were thinking of possible football or some other encounter with sophomores, the campaign was beginning that was to end a fortnight later at Antietam; and Lincoln was waiting for that victory to strengthen his arm before he issued the first proclamation of emancipation. . . . Every Commencement Day, every College festival was full of inspiration; and the daily newspaper with its chronicle of battles in which Harvard men had won honor or had laid down their lives made its more direct appeal. I can recall no more impressive scene than the military funeral of the heroic Patten in Appleton Chapel, and the venerable form of ex-President Walker as he took his place in the pulpit—and his tremulous tones as he began his reading with the words "The beauty of Israel is slain on thy high places." . . . I stand before Holworthy on the morning when Lee's surrender was announced and hear the songs and cheers with which the whole College, released from discipline, celebrated the good news.

. . . I remember more vividly than anything that happened yesterday, how on my way to prayers and twenty feet from the old Massachusetts pump, I met my classmate who told me the news of Lincoln's assassination on Friday night; and I hear through the windows of the room in University, while the Latin recitation is going on, the tolling of the bells which announced the President's death. . . . I sat in the great tent spread between Harvard Hall and Holden Chapel, and witnessed the Harvard Commemoration; saw Bartlett rise to speak, and pause unable to proceed, until Colonel (Henry) Lee came to his relief and bade him be seated, since his modesty was only equalled by his valor; and heard Lowell read for the first time the Commemoration Ode, which must always remain for everyone who heard it, a source of inspiration.

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(1) See *Harvard College in the Sixties*, by Moorfield Story—*Harv. Graduates Magazine* Vol. V (1896-97).

See also *Reminiscences of Gen. W. F. Bartlett and Harvard Commemoration*, by C. W. Clifford—*Harvard Graduates Magazine*, Vol. III (1895).

See also *Life of Henry Lee*, by John T. Morse, Jr.

When the question of reconstruction began to rage bitterly in Northern politics, immediately after the close of the war, Professor Parsons again took an active part in the agitation, writing several vigorous letters to the public press, entitled *The Perils of Peace*. He was in hearty sympathy with Sumner, Wendell Phillips, and other extremists who insisted on the most rigorous treatment of the Southern States until equal suffrage for whites and negroes should be surely guaranteed.

Of the great reconstruction meeting in Boston on June 21, 1865, just one month before the Harvard Commemoration Day, a vivid account is given in the *Life of George Luther Stearns*.

Stearns was a relative of Professor Asahel Stearns, and one of the most earnest and earliest of the Free Soilers and Abolitionists. He had been one of the founders of the *Nation*, in New York in 1865, the chief object of which was to advocate reconstruction with just conditions for the negro. His meeting with Parsons and its result are thus described by his biographer(1):

At a certain party in Cambridge connected with the affairs of the *Nation* he met James Russell Lowell, who seemed to be surprisingly ill-informed concerning public affairs, and also Professor Parsons of the Law School, whom he found to be no university fossil, but a live man with a heart in him and a mind of his own. They had such an agreeable conversation that the Professor invited Mr. Stearns to call at his house and continue their discussion. This Mr. Stearns did a few days later. . . . Theophilus Parsons was a man of conservative tendencies, a friend and admirer of Webster, but as stout a patriot as old John Adams. He always considered the Fugitive Slave Bill a political blunder and was not surprised at the consequence of it. He was not a hide bound conservative but a growing man at sixty, and Mr. Stearns found great agreement with the plan of reconstruction, which he expanded before him. He urged the Professor to write out his statement and publish it—Professor Parsons did not know where he could publish it. He was not "in the ring"; the *North American Review* was closed to him; and as for the newspapers, there was too much uncertainty about them. Mr. Stearns rose and walked the floor. "There must be a way," he said. Then suddenly: "Write out your statement. My friends and I will call a meeting in Faneuil Hall and I will obtain fifty of the best names in Boston for Vice-Presidents and you shall be President of the meeting."

No sooner said than done. Everybody fell into line as if by

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(1) *Life and Public Services of George Luther Stearns*, by Frank P. Stearns (1907).





Richard H. Dana

magic. Forbes, Endicott and Atkinson were delighted. Merchants like Alpheus Hardy and Henry Lee signed the call. . . . Never was Webster supported by a more solid phalanx. The meeting was held on the 21st of June and Faneuil Hall was crowded. Professor Parsons' address was nearly equal to the best of Webster's oration—so clear was his thought, so cogent his reasoning and emphatic his delivery.(1)

Professor Washburn was one of the Vice-Presidents of this meeting. Professor Parker did not share his colleagues' views on the reconstruction question, and he expressed his own opinions on that and allied subjects with his accustomed vigor in several lectures delivered to the students in January, 1865, and January 1866, on *Revolution and Reconstruction*, and also in magazine articles and lectures in 1867, 1868 and 1869 on *Three Powers of Government*.

At the beginning of the year 1865-66, the close of the war brought a great tide of law students, the number advancing to 177, and 153 in the second or spring term of 1866, from 24 States, the District of Columbia, New Brunswick and Nova Scotia. To this growing prosperity of the School was due the vote of the Corporation, December 15, 1865, increasing the salary of Parker, as Royall Professor, to \$3,000. On January 27, 1866, the Corporation appointed the President and Judge Hoar as a Committee to consider the salaries and duties of the Law Professors; and on March 31, 1866, appointed Richard H. Dana, Jr., as Lecturer on the Law of Nations, to give ten lectures, at a salary of \$1,000(2). Dana's lectures were so satisfactory to the students that he received a re-appointment as Lecturer on October 26, 1867, giving in that year two courses, instead of one.

The year 1866-67 opened with 167 students, and 120 in the

(1) Parsons concluded his speech as follows:

"And we declare it to be our belief that if the Nation admits a rebel State to its full functions with a Constitution which does not secure to the freedom the right of suffrage in such manner as to be impartial and not based in principle upon color, and as to be reasonably attainable by intelligence and character, and which does not place in their hands a substantial power to defend their rights as citizens at the ballot box with the right to be educated, to acquire homesteads, and to testify in courts, the Nation will be recreant to its duty to itself, and to them, and will incur and deserves to incur anger and reproach, proportioned to the magnitude of its responsibility."

(2) This appointment was confirmed by the Overseers June 26, 1866, his second appointment being confirmed January 9, 1868. Dana resigned his position as United States District Attorney in 1866, having been appointed in 1861.

spring term of 1867, from 21 States, District of Columbia, New Brunswick and Nova Scotia.

It may be of interest to turn at this point from dry statistics and annals, to a feature of law student life which was again becoming prominent. The old Debating Club, the Assembly or Parliament of the ante-bellum days, had burnt itself out at the beginning of the war, by the very heat of its own discussions. It was now revived; and the following articles, appearing in the undergraduate fortnightly College paper, the *Harvard Advocate*, give a good idea of this Law School institution, which played an important part in the life of the day. On September 24, 1866, the *Advocate* said(1) :

Students who are interested in politics or desirous of an acquaintance with the niceties of parliamentary law, cannot do better than to drop in occasionally at the session of the Assembly of the Harvard Law School. They are held in Dane Hall every Friday evening. The Law School contains many men of decided talent and many an original genius. Representatives of every shade of politics deliver their views with perfect freedom, and often with considerable applause. Last Friday, the Assembly organized by the choice of Mr. Horace Graves (Harvard '64) of Marblehead, as speaker, by a small majority over Mr. Ambrose H. Purdy of N. Y. This result is supposed to indicate the superior strength of the party opposed to the policy of the administration.

On April 10, 1867, it said that(2) :

We have twice been to the Law Parliament of late and thrice and four times forcibly impressed with the profundity and acumen of the embryonic judges that sit there in sober state—One night they debate on the "State of the Law School"; and again, determined to reach the very root of the matter and moreover duly impressed with the fact that their own extensive experience should have mighty weight in State Legislation, the "Committee of the Whole" "gets leave to rise and set again" on the Law School's resolutions, calling for a License Law. A young proctor they elect Sergeant of Arms to bring aguish members to the bar of the house (a ticklish business this to the *bar* of any house), and counsel are chosen to examine witnesses. All goes merrily; and the harmonious conclusion is deduced that the only effect of the Prohibitory Law is to stimulate high prices and poor whiskey which is a curse to the land.

(1) *Harvard Advocate*, Vol. II.

(2) *Harvard Advocate*, Vol. III.

A picturesque personality, well known to the law students of those days, and for twenty years later, is described in another article, December 11, 1866—Daniel Pratt—the “Great American Traveller”—whose bombastic and meaningless phrases like—“We live in the future of the past”—“the unity and equilibrium of the Universe always to be sustained”, and whose orations on *The Incomprehensibility of Nothingness* and *The Plentitude of a Molecule’s Eyeball* still linger in the memory of many.

The announcement that Daniel Pratt, the Great American Traveller, would deliver a poetical oration upon the laws of the Universe and the “Analogy of the Soil and the Soul” at Dane Hall November 16, induced a majority of the members of the Law School and quite a number of undergraduates to assemble in the Parliament Room at the appointed time.

It ended in the unfortunate man fleeing in fear of arrest and pursued by a thoughtless crowd.(1)

The year 1867-68 began with 125 students, and in the spring term of 1868 “they came from every part of the Union, about twenty-five States, on an average, being represented each year; so that there is no extravagance in regarding the School, thus constituted, as one of the instrumentalities that must help to promote a good understanding between the different sections of the country.”(2)

During the year 1868, the political situation growing out of the struggle between President Johnson and Congress over reconstruction measures excited much interest in the Law School; and bitter political debates, recalling those which took place in anti-slavery times, again arose in the Assembly or Parliament of the School.

The debates were described by Horace R. Cheever in a letter to the *Boston Daily Advertiser*, June 9, 1868:

Twice during the present term have political questions been fairly before the Assembly. Early in the term, while Mr. Johnson was on trial, a resolution was introduced to the effect that “no officer of the government ought to be impeached for violation of a law of doubtful constitutionality”.

(The resolution was lost).

Close upon this was a resolution which declared that the re-

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(1) *Harvard Advocate*, Vol. II.

(2) *Report of Visiting Committee to Board of Overseers*.

construction policy of Congress is unconstitutional and impolitic and that it ought not to be enforced; and this, after a zealous debate through seven evenings, was lost. The Assembly is and has been for the whole year Republican; and we have with a full house a good working majority.

The letter above quoted was inspired by an amusing episode in the Assembly. At a meeting on June 5, the Democratic members being temporarily in the majority, owing to absence of many Republicans, had hurried through the following vote:

"Resolved, that the Assembly congratulate President Johnston upon the result of the late impeachment trial". This stirred Cheever, the Speaker of the Assembly, "in behalf of the Republican majority of the Assembly", to write the above letter, full of indignation, and saying:

We make this explanation because we are unwilling that the stealthy action of a minority shall be taken as an expression of the sentiments of the majority in behalf of one whom it has twice refused to endorse and whom an overwhelming majority of the people's representatives have pronounced to be an unworthy successor of an illustrious patriot and martyr.

The political stress of the day again cropped out, in an episode in the Assembly at its first meeting in the fall term of 1868—described by the *Commonwealth*, in its issue of Sept. 26, 1868, under these headlines, *Reconstruction at Harvard. How a White Man's Government Didn't Succeed at the Law School.*

Prejudice against color, the lingering relic of slavery still exists among us and crops out once in a while. The last exhibition of it took place at the Law School of Harvard College last Friday evening at the first meeting of the Assembly, so called, for the term.

The "Conservatives" of the institution are of rather an aggressive turn; and it will be recollected that last spring they made themselves uproariously noisy against the impeachment of Andrew Johnson, but were badly beaten despite their rebel tactics and trickery. Last Friday, their efforts were directed to the prevention of a colored gentleman, Mr. R——, a member of the School, from joining the Assembly, and again they had to haul off their badly demoralized and discomfited forces.

The movement had its origin in the "Marshall Club", an organization which is run in the interests of a white man's government—the members of which had a meeting, the evening before, when they laid their plans and prepared a line of conduct which



was to succeed surely.(1) They came to the regular meeting of the Assembly on Friday promptly on time, gathered themselves into a knot, conferred once more and commenced action by nominating one of their number for speaker, in which they were successful; he was elected, as was also their clerk.

. . . One of the leaders offered a resolution to the effect that the first rule, declaring that "every member of the School shall be of right a member of the Assembly upon signing its rules and orders," was not intended to include colored persons.

After an exciting debate, in pursuance of this "copperhead plot," in which Mr. R——, himself, a highly educated man, a protégé of Wendell Phillips, and a prominent anti-slavery orator, took part, and in which Mr. B—— of Georgia, private secretary of Alexander F. Stephens, "made an old fashioned, pro-slavery speech", the motion was withdrawn.

Early in 1868, Professor Parker, after twenty years' service, being then seventy-three years old, decided to resign from the Royall Professorship; and his resignation was accepted by the Corporation, February 29, 1868. On April 28, President Hill wrote to him(2):

Your letter resigning the Royall Professorship was accidentally delayed on its way to the President and Fellows and not laid before that body until long after its writing.

The Corporation were too well aware that it would be useless to oppose your decision, and they had no alternative but to accept the resignation. Permit me to assure you that they expressed the deepest sense of the value of your long fidelity to the duties of the office, and that they would have embodied the expression in some formal action, had it not been the established principle to refrain from such testimonials. But in the name of my col-

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(1) It seems that this was a mis-statement. In the Record Book of the Marshall Club under date of Sept. 3, 1868, appears the following: "The attention of the Marshall Club having been called to an article in last week's issue of the 'Commonwealth' newspaper regarding the proceedings in the Harvard Law School Assembly in which certain measures are stated as having originated in the Marshall Club, such statement being wholly incorrect,

*Resolved:* that the Club believes it not only the right but the duty of every American Citizen to take advantage of every opportunity of education to raise himself in the scale of humanity, and so far from desiring to exclude any person from the advantages of education that we enjoy we believe in offering every encouragement to any person who desired to avail himself of the benefit of this institution."

The vote was offered by William W. Carruth, seconded by John P. Davenport, Jr., opposed by Cassius K. Breneman. It was also voted to publish the above in the Boston Papers.

(2) *Harv. Coll. Archives Letters of the President.*

leagues I venture to utter their thanks for your faithful and valuable services and their wishes for your long enjoyment of a well earned rest. (1)

As Parker had been contemplating this step for some months, Professor Parsons had in the mean while been considering a possible successor. Finally he decided to turn to his friend Nathaniel Holmes, then Chief Justice of the Supreme Court of Missouri. Both Holmes and Parsons were very zealous in their adherence to the Swedenborgian religious beliefs; and this fact undoubtedly had an influence in determining Parson's choice. On February 5, 1868, he wrote to Holmes (2):

Professor Parker has resigned. I have reason to believe that the Corporation of the College, (who have the exclusive right of appointment) have not yet made choice of his successor.

It is possible they may ask Professor Washburn and myself for some suggestion. In that case, will you do us the very great favor of permitting us to mention your name to them?

The work is this. You would give to lectures and Moot Courts about 50 or 60 forenoons, and a dozen afternoons, in the course of a year. Your office, with all its expenses, is provided for you; and the young men would call occasionally for advice or assistance in their studies, which you would find pleasure in giving them.

The vacations are about five weeks in winter, and nine or ten in summer.

After a year or two, when you have gone through the course, (which repeats itself every two years) you would have abundant time for practice if you wished, or for literary labor. And if this was connected with the profession, I need not say that the School and the position you would hold in it, would give you great facilities, not only for writing the books, but for making them profitable.

(1) Joel Parker died, seven years later, on August 17, 1875. He was a non-resident Professor of Law at Dartmouth College, 1868-1874. For many years he was a Fellow of the American Academy of Arts and Sciences, and a member of the Massachusetts, the New Hampshire and the Connecticut Historical Societies.

In addition to his work at the Harvard Law School, he was Professor of Medical Jurisprudence in the Columbian Law School in Washington, 1847-1857; and he gave lectures on that subject in the Boylston Medical School in Boston in 1851 and in the Medical College in New York.

Besides the papers, lectures and articles previously mentioned, he was the author of *Law of Homicide (the Webster Case)*, published in 1851; *Origin, Organization and Influence of the Towns of New England*, in 1867; *First Charter and Early Religious Legislation of Massachusetts*, in 1869.

(2) This letter and the letter from Nathaniel Holmes are in the possession of Professor Parsons' heirs.

The pay is now but \$3000 a year. But an effort will be made to increase this, and I have great confidence that if more is needed to secure your acceptance, more would be had.

Now my dear Sir, we would be unwilling to *persuade* you to come here. I cannot however forbear expressing our strong desire that you should permit us to consider you as willing to come; or, at least, as willing to take this thing into consideration if the offer be made you. I will not promise that everybody will be converted to "Baconism", but I am sure that your scholarship and intellect will be recognized.

Holmes replied, February 13, 1868:

The kind expressions of the first part of your letter of the 5th inst., I scarcely need say, were very grateful to me: the second part threw my ideas into greater confusion than I can possibly imagine my erratic book to have done yours—as if I had been invited to shift my residence into the planet Jupiter, or to take my place in Heaven at once. But how to think of tearing up my roots here in this Missouri earth!

On the eve of starting for St. Joseph (for two weeks), without further reflection, I must give you some answer. In many respects, I confess, the idea presents an agreeable vision to my family. I am doubtful of my sufficiency—but that the favorable opinion of Prof. Washburn and yourself might inspire me with courage to waive that objection.

Should I be required to appear among you (in case the choice fell on me) before the beginning of the winter term in Sept. next? My present term on the Bench expires with this year. I should not like to resign before the end of our August Term, and thus impose on the Governor the necessity of making another appointment for the short time before the regular elections in November would fill the place.

Again, could the Corporation determine the matter between this and July next? or sooner than July?

For I should like to know, in time, whether to accept a nomination for re-election.

Our Legislature has under consideration a bill (already agreed to by the Senate and now awaiting the action of the House) to raise the salary of the judges to \$4000. You suggest a possible increase of the salary of the Professor. In this matter, I should not be disposed to chaffer at all, but would leave it wholly to the discretion of the proper authorities.

There, my dear Sir, you see the inclination of my mind; and as a lawyer may be expected to come directly to the point, I may say that I will leave it to your better judgment whether to present my name or not, reserving only some right of further consideration if it should become necessary, and with the hope that (if you persist) you may be able to let me know of any affirmative

result at as early a day as practicable, in reference to the course I should then have to take here; and of course if the Corporation should happen to find a better man, there will be no harm done.

On June 27, 1868, the Corporation elected Holmes as Royall Professor, and the Overseers confirmed this action, July 15.

Nathaniel Holmes was born January 2, 1815, at Peterborough, N. H. In 1822 his family removed to Vermont; he studied at Chester Academy in Vermont and at New Ipswich Academy in New Hampshire, entered Harvard College in 1833 and graduated in 1837. In 1838, he became private tutor in the family of a Maryland planter. During 1838-39 he studied at the Harvard Law School, and at the close of the year 1839 was admitted to the Bar in Boston. Immediately thereafter he went to St. Louis, where he was admitted to the Bar in 1840. In 1842, he was looked upon as having exceptional ability, and was already in the enjoyment of a good practice. In 1846, he was elected Attorney for the City and County of St. Louis. In the years 1853 and 1854, he was Attorney for the St. Louis Public School Board. About this time, the St. Louis Law School, a part of Washington University, was established, and he became a member of the first Faculty, his subjects being History and Science of Law, Equity Jurisprudence, and Pleading and Practice.

In 1861, when the war came on, at a convention chosen by the vote of the people, a provisional government was established for the State of Missouri, and among other things passed by the convention was an ordinance vacating the offices of the Judges of the Supreme Court of Missouri. Under the authority of that ordinance, Gov. Gamble appointed as Judges, Bates, Bay and Dryden. Subsequently, in November, 1863, these three Judges were elected by the people for a term of six years.

On February 13, 1864, the General Assembly of Missouri passed an act providing for the calling of a State Convention to consider certain amendments to the State Constitution. On March 17, 1865, the Convention, so called, passed an ordinance vacating the offices of the Judges of the Supreme Court.

Gov. Fletcher, who succeeded Gov. Gamble, acting under the ordinance, notified Judges Bates, Bay and Dryden to vacate, and appointed three new Judges in their places, including Holmes. Each set of Judges thereupon called a special term of the Supreme Court of the State of Missouri, to be held in the City of



*Nathaniel Holmes*



St. Louis on June 12, 1865. The old set of Judges, nevertheless, having possession, took their seats on the bench on that day, and endeavored to proceed with the Court's business. The Attorney General (Coleman) for the State of Missouri, acting at the instance of the Governor, notified these Judges that unless they vacated their seats at once they would be forcibly removed. The old set of Judges refused to pay any attention to either the Attorney General or the Governor. Thereupon the Attorney General returned to the court room with the police force, removed the old set of Judges by force, lodged a complaint against them for disturbing the peace, and with this mixture of military and judicial authority closed the incident, and put Nathaniel Holmes on the bench of the Supreme Court of the State of Missouri.

For twenty years, 1856-76, Judge Holmes was the Corresponding Secretary for the Academy of Science in St. Louis. In 1859 he received from Harvard the degree of Master of Arts. In 1866 he published at Boston a book entitled *The Authorship of Shakespeare*, being an endeavor to prove that the dramas of Shakespeare were written by Francis Bacon.

The bad financial condition of the times was beginning to have its effect; and the numbers in the School, 1868-69, did not substantially increase, being 142 in the first term and 115 in the second. The question of expense of attendance at both the Law School and College was troubling the authorities; and Acting President A. P. Peabody said in the President's Annual Report, for 1868-69:

It is much to be desired that there should be some method for reducing the very heavy expense of attendance at the Law School. The erection of dormitories for the use of the students, whether expedient or not, is at present out of the question. But arrangements similar to those of the Thayer Club, for furnishing board at cost, are no doubt practicable, should the right persons take the initiative. Moreover, while we doubt the expediency of extending strictly eleemosynary aid to professional students of any class, a loan fund for law students would be an unspeakable relief and benefit; and the experience of the Professors in loans to a limited extent in cases of intense need authorizes the belief that such a fund would hardly ever incur a bad debt, so that subscription to it would be simply an investment, not a sacrifice.

In view of the many criticisms which were later made on the condition of the School during this period, 1860-68, it should be

noted that its methods and courses of instruction were approved in several official reports by the Faculty and by the Visiting Committees.

The Visiting Committee reported for the year 1862, "entire satisfaction with the plan of instruction adopted and the manner of carrying it out."

The Law Faculty reported December 30, 1863, to the Visiting Committee:

The course of instruction adopted by the wisdom of their predecessors after a large experience, is believed to be well adapted to the wants of the young men who desire to avail themselves of the advantages of the School, and the Professors have been slow to risk innovation.

The Visiting Committee for 1863 reported:

We were entirely satisfied that both the matter and manner of the lectures attended by it, given by Royall Professor Judge Parker to a large number of students, were admirably calculated to impress and improve the students who listened to it.

Dec. 28, 1864, the Law Faculty reported:

The modes of instruction heretofore adopted appear to have accomplished satisfactory results and the Professors have not been inclined to try experiments.

The Visiting Committee for 1864 reported that they were "entirely satisfied with the condition of the School."

The President's Annual Report for 1864-65 thus summed up the general system of instruction—a system which only five years later was to be entirely revolutionized by the advent of the Eliot and Langdell régime:

As there have been no new arrangements in relation to the organization of the School or the course of instruction, the Faculty have nothing to add to their previous reports on these subjects, and therefore adopt the language of their last report.

As stated in their last report, ten Lectures are delivered in each week, with occasional extra Lectures, generally from text-books designated; and in the course of the Lectures examinations are made, by inquiry of the students as to cases or principles presented to them in connection with the subject matter of the Lecture. The Faculty continue this method of examination, being convinced that no other would meet so satisfactorily the wants of the School.



A Moot Court has been held each week by one of the Professors. The Law Faculty repeat the expression of their confidence in the great utility of these courts. That they must be especially useful to the students engaged in them as counsel, is obvious. But they are always equally profitable to others who investigate the questions presented, and indeed to all who attend them, and make use of the opportunities they offer to learn to take notes readily and accurately.

Clubs for discussion and debate, and for the argument of cases have been continued by the students. The Faculty regard them as eminently useful, and provide for them all the facilities and encouragement in their power.

Prizes for Dissertations have been awarded as before.

The President's Annual Report for the year 1868-69, the last one made prior to the upheaval in the Law School, brought about by the appointment of C. C. Langdell as Dane Professor and as Dean, shows that, according to the views of the then President, the School was by no means in an unfortunate position—even under the old régime:

In the Law School, Hon. Nathaniel Holmes has entered on his duties as Royall Professor of Law, thus completing the normal, though by no means the desirable, number of resident Professors. The year's record is the usual one of success and prosperity. The Professors do not deem their duty fulfilled by lectures and class-instruction. In their rooms in Dane Hall they are accessible by their pupils at all hours, and those who are veritably students can always obtain from them the direction and assistance they may need.

The course of instruction was in general so laid out as to be repeated by each Professor every other year.

Lectures were given as follows: by Professor Parker—Constitutional Law and Jurisprudence of the United States in each year, Equity Jurisprudence, Law of Corporations in 1861-62, and alternate years; Bailments in 1861-62, and alternate years; Agency in 1860-61, and alternate years; Law of Writs of Error in 1866-67; Equity Pleading in 1861-62 and alternate years, Common Law Pleading in 1860-61, and alternate years; by Professor Parsons—Kent and Blackstone each year; Insurance in 1860-61, 1865-66, 1866-67, 1867-68; Evidence in 1860-61, and alternate years; Contracts in 1860-61, 1864-65, 1866-67; Bills and Notes in 1861-62, 1862-63, 1863-64, 1865-66, 1867-68; Partnership in 1861-62, and alternate years; Shipping and Admiralty in

1862-63, 1863-64, 1865-66, 1867-68; International Law in 1863-64, 1864-65: by Professor Washburn—Real Property in each year; Arbitration in 1860-61, 1861-62, 1864-65; Bankruptcy and Insolvency in 1861-62, 1864-65, 1866-67; Criminal Law in 1860-61, and alternate years; Wills and Administration in 1860-61, and alternate years; Conflict of Laws in 1861-62, 1864-65, 1867-68; Equity Pleading and Evidence in 1867-68; Domestic Relations in 1862-63, 1863-64, 1865-66, 1867-68; Sales in 1863-64, 1866-67: in 1866-67 Richard H. Dana delivered a course on International Law, and in 1867-68, two courses on the same subject.

## WAR RECORD.

At this end of the War Period, the following record of the students of the School who enlisted in the Union army may be noted(1):

Total students of Harvard University who so served, including graduates and non-graduates.....	1337
Of Law School graduates (LL.B.'s), who had also been Harvard A. B.'s or Harvard non-graduates.....	60
Of Law School graduates (LL.B.'s), who were not Harvard men .....	113
Of Law School non-graduates, who had also been Harvard A. B.'s or Harvard non-graduates.....	49
Of Law School non-graduates, who were not Harvard men .....	82
Total from the Law School.....	304

Of the Law School students who either left or graduated during the years of the war the following number served in the Union army:

From the Class of 1860.....	20
From the Class of 1861.....	35
From the Class of 1862.....	21
From the Class of 1863.....	9
From the Class of 1864.....	11
From the Class of 1865.....	8

In the classes just after the war, the following number of law

(1) The figures are compiled from *Harvard University in the War of 1861-1865*, by Dr. Francis H. Brown (1886); and from an article by Dr. Brown in *Harv. Grad. Mag.*, Vol. X (1902).

students who had served in the war graduated or left the School :

In the Class of 1866.....	19
In the Class of 1867.....	18
In the Class of 1868.....	6
In the Class of 1869.....	2

It is greatly to be regretted that no full compilation has yet been made of the graduates and non-graduates of Harvard College and of the Law School who served in the Confederate army. An incomplete manuscript is now in the College Library awaiting sons of Harvard or of its Schools who shall have the time and interest to make the research necessary to complete the record. Meanwhile the passing of every year will make the work more difficult. The lack of such a full list of the Harvard supporters of the Confederacy is especially deplorable with regard to the Law School owing to the large attendance at that School from the Southern States before the war.

## CHAPTER XXXVII.

### PARKER, PARSONS AND WASHBURN.

It has been somewhat the habit of writers and speakers in recent years to glorify the condition of the Law School during the Langdell régime and to depreciate correspondingly its condition under the previous régime.

This tendency was the subject of a spirited reply from Professor Joel Parker as long ago as 1871, when he printed his pamphlet on the Law School, in defence of attacks made in an article in the *American Law Review* in October, 1870, and in a report of the Visiting Committee to the Overseers Oct. 17, 1870.

Referring to the former, Judge Parker said:

Had the author of the article been content to commend the new order of things without disparagement of the old . . . the matter might be passed without notice. But the declaration that "for a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts," stands at the head and front of the article; and the phraseology, although not very clear or happy, seems to have been deliberately chosen. . . . Whoever may be the author, it is put before that portion of the profession who read the *Law Review* with the endorsement of the editors of that magazine—two young men, it is understood, who about four years since, consented to receive the honors of the School in the shape of a degree of Bachelor of Laws.<sup>(1)</sup> . . . It is difficult under the circumstances to say which is most prominent in the article, the conceit which dictated it or the entire lack of courtesy manifested by it. . . . The learning and ability of the present corps of instructors warrant the prediction that their labors will make the School what it ought to be. . . .

These utterances present grave charges against the School generally, against the rules upon which it has been conducted ever since it was established, and, by implication at least, against some of its previous Instructors, who, it must be supposed, did not do what it is predicted the present will perform. . . .

I may naturally be supposed to have some interest in the reputation of the School, to say nothing of my own. Others have an interest also. . . . The other members of the Corps of In-

<sup>(1)</sup> O. W. Holmes, Jr., (L. S. 1864-66) and Arthur G. Sedgwick (L. S. 1865-67).

struction and the relatives of those who were members previously. If the School has been "for a long time almost a disgrace to the Commonwealth, it has been an entire disgrace to the Corporation to permit such a state of things. It may be added that all the past members of the School—especially those who have received this discreditable degree conferred without preliminary examination—cannot take much pride in their membership if its character has been what is thus represented.

Professor Parker thereupon presented an elaborate sketch of the history of the School, in order to refute the above criticisms.

Further refutation, if needed, is amply supplied by the grateful recollections of hosts of those who received their legal education in the School, 1850-1870.

Testimony of their gratitude and indebtedness to the teachings and influence of the Professors of these years has repeatedly been given in speeches and has been strikingly set forth in many letters to the author.

It is well, therefore, for the graduates since 1870 to remember that there were indeed "kings before Agammemnon."

Thus Charles R. Codman, (L. S. 1851-52), of Boston, writes(1) :

The general tone of the students in my day was much as I understand it to be now. They were there to work, they were no longer boys, and were under no undergraduate restraints. There was plenty of hard work done.

Henry N. Blake (L. S. 1856-58), Judge of the Supreme Court of Montana, writes :

While no entrance examination was required, there was a high percentage of graduates of colleges; and of the others, most of them held diplomas from academies and high schools.

It was a tradition that only one student was expelled from the Law School for immoral conduct, and this person became a Member of Congress. While I approve most cordially of the new system of teaching law which prevails in the School, I contend that, with rare exceptions, the pupils in my generation did not waste their opportunities. Those who knew they must live by the fruits of their profession toiled early and late. I have carefully reviewed the names of classmates who received in 1857 and 1858 their degrees. The total number, 105, is small by comparison

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(1) This letter and the following letters, unless otherwise stated, were written to the author in 1907 and 1908.

with the classes of recent years; but the members were thoroughly acquainted, and I am convinced that 25 per cent. would have passed a satisfactory examination in the courses there prescribed. . . . In 1858, Hon. David Dudley Field, who served on the committee to award prizes for essays, delivered an address to the School and congratulated the students upon their good fortune in learning law in an institution having superior facilities; he regretted deeply that he did not have the benefit of the School when he was a young man.

Joseph H. Choate (L. S. 1852-54) said, in 1895, at the Langdell dinner of the Harvard Law School Association:

I know how painful eulogy is to Professor Langdell, and therefore I may throw out some suggestions that will serve perhaps as a little antidote to that of which the learned Professor from Oxford and your presiding officer have been so profuse.

I can remind him that there was a Harvard Law School before he was. I claim myself to have enjoyed the tuition of Harvard College and of the Dane Law School in the golden age of each of these institutions, profound as is my admiration for our present distinguished president. . . . I do wish to say a single word of tribute to the memory of Professor Parsons, who was then the most accomplished of the Professors of the Law School and the only one of whom I ever learned much of anything. I do not claim that he was a very profound lawyer, at least before he made the acquaintance of Professor Langdell, but he was one of the most charming and delightful of men. It was his maxim of life—that it was the duty of every lawyer to get all the entertainment possible out of his work as he went along; and whether in his lectures, in social converse, in court, wherever he was, he had a most delightful way of saying things. Even while uttering the foundation principles of the Common Law he impressed them upon the minds of his hearers in a way that I, for one, have succeeded in carrying always through a long professional career.

Now "by their fruits ye shall know them", and I think there were fruits from the old Dane Law School with which even those of the present administration may sometimes hesitate to challenge a comparison.

And in a letter to the author, Mr. Choate says:

My own experience at the Law School was most interesting and valuable. Of all the Professors, the most valuable to me was Theophilus Parsons, although he had none of the profundity and deep learning of Judge Parker. But he essentially had everything that he knew at his tongue's end, and had a very happy faculty of imparting information and of impressing the common

maxims of the law upon the minds of the students and enforcing the same occasionally by an interesting story. In this way, I think, he made a much deeper impression upon the minds and memories of the average students than the others, and many an utterance of his I have had occasion to use in years long afterwards, and have been very grateful to him for the knowledge that he thus imparted. Judge Parker was altogether too deep for me, although Langdell and Carter, who were students at the Law School about the same time, regarded him as the center from which the gladsome light of jurisprudence chiefly emanated. But he was altogether too learned and profound for the average mind to follow. Judge Loring suffered somewhat from his then recent unfortunate association with the fugitive slave cases, which at the time seriously affected the public mind and the judgment of those who took part in them, although I believe him to have been absolutely conscientious, however misguided in what he did. He too, was fond of reiterating the common maxims of the law, and sometimes stamped them so deeply upon our minds as never to be obliterated—as for instance the one he chiefly prided himself in his lectures on the Domestic Relations—that “husband and wife are one, and that one is the husband”. In this respect the law has happily changed since his time.

My impression is that the manner of dealing with the students of the Law School at that time was a very wholesome one, and amply sufficient for all those who were there with any earnest desire to fit themselves for the profession, although those who did not, and attended as a mere pastime, did not get much out of it. There were no examinations, attendance at the lectures was voluntary, but most of the students were very zealous in their attendance. There was no cramming, which is such a vitiating feature, in my judgment, in the modern methods. Whoever wanted to learn, learned quite enough.

In no branch of education is the personality of the Professor of so great importance as in the study of the law. The Professors *were* and *are* the Law School.

It was not the Library, the Moot Court, or the study of the text book, which made the lawyers of 1845 to 1870; it was the influence of the character and individuality of Joel Parker, of Theophilus Parsons, and of Emory Washburn. They were, all three, great men, and each in his individual way. Parker was the great lawyer; Parsons, the great teacher; and Washburn, the great man.

Mr. Justice Oliver Wendell Holmes, (L. S. 1864-66) has thus epitomized the three Professors:

Parker, who I think was one of the greatest of American Judges,

and who showed in the chair the same qualities that made him famous on the bench. . . . Parsons, almost if not quite, a man of genius and gifted with a power of impressive statement which I do not know that I have ever seen equalled; and Washburn who taught us all to realize the meaning of the phrase which I have already quoted from Vangerow, the enthusiasm of the lecture room. He did more for me than the learning of Coke and the logic of Fearné could have done without his kindly ardor.

John C. Douglass (L. S. 1855-57) of Leavenworth, Kansas, writes:

Judge Joel Parker, in his chair in the lecture room, was always dignified and judicial in manner, and spoke as if by authority, never indulging in trivialities, but not infrequently giving zest to the closing sentences of an argument by an anecdote told in a quiet way, and always to the delight of his hearers.

Theophilus Parsons was of affable and pleasing manners. His style was didactic, and abounded in anecdote and illustration. He was careful to present both sides of all questions discussed by him in his lectures, fully and fairly, and seemed greatly pleased when he had so skilfully done this, as to keep the weight of the argument so equally balanced between the two views as to leave the result in doubt, until the very close of his argument, when his own pleasure was greatly enhanced by the surprise of the class, at a decision which, while very clear and convincing, was contrary to the one it expected.

Emory Washburn was genial, frank, and unaffected in his manner and speech. His style was natural, argumentative and direct to the point, with no effort at witty speeches, or flowing diction, but his lectures were always instructive and eloquently delivered.

Theodore H. Tyndale (L. S. 1866-68) of Boston, writes:

Washburn, full of interest, and sympathy with the students, and each individual one of them, always willing and ready to talk with them to clear up doubtful points, not only upon legal questions, but to give personal advice and encouragement. He was not content with merely fulfilling his ordinary duties, but gave, during my time, a very instructive and helpful course upon comparative law, especially in regard to administration of estates. Professor Parsons was variously gifted, discursive, a prolific writer, very entertaining in his general addresses, which he gave with great regularity every term. Professor Parker was a close reasoner, spare and precise in the use of words; not so fortunate in his gifts as a lecturer and with less personal contact with the students than either of the other Professors.



Henry B. Brown (L. S. 1859), later Justice of the United States Supreme Court, said in 1895(1) :

The Harvard Law School at that day was without a rival. Its corps of instructors was small, but they had no superior in the country. There was Emory Washburn. . . . a man of strikingly handsome and intellectual face, whose eloquence made even the law of contingent remainders interesting, and the Statute of Uses and Trusts to read like a novel. There was Theophilus Parsons, genial and enthusiastic, the most prolific legal writer of his generation, whose lectures upon admiralty and commercial law wedded me to that branch of the profession. . . . There was also Joel Parker, who. . . . brought to the platform of the lecturer the sedate yet kindly manner that had characterized him upon the bench, and who was in my eyes the very ideal of what a judge ought to be. . . . My fellow students were of the best blood in the land,—sons not of New England only, but of every State North or South and East of the Mississippi. John Brown's raid upon Harper's Ferry occurred while I was here, national politics ran high, and mutterings of civil war had already begun to be heard.

#### JOEL PARKER.

In appearance and character, Professor Parker was a type of the best New England lawyer and gentleman of his day—a man of dignified and commanding presence; acute and profound of mind, though somewhat addicted to firing over the heads of his pupils and even of his fellow lawyers. His lectures were apt to be "dry although lighted up at intervals with a flash of grim humor or a bit of amusing sarcasm." He was aware, however, of his own dryness as a lecturer; and M. F. Dickinson (L. S. 1866-67) writes, that "one hot day in the summer of 1867, when Parker came into the lecture room for his Equity lecture, he found only fourteen students present. Mounting the platform, he turned and smiled benignly upon us, gazing over his gold bowed spectacles, and solemnly said: 'He that endureth to the end shall be saved.'"

It has been said of him that "though deeply respected for his thoroughness, he was precise, minute and involved, to the point of obscurity. If a single step of his logic was lost by the listener, farewell to all hope of following to the conclusion. His law on

(1) Speech at the Dinner at the 9th Annual Meeting of the Harvard Law School Association, June 25, 1895, "in especial honor of Christopher Columbus Langdell."

any given question was sound, absolutely and exasperatingly sound, but he could no more give a comprehensive view of a whole topic than an oyster, busy in perfecting its single pearl, can range over the ocean floor. In private, however, the Chief Justice was always interesting and often witty. He was of high breeding, constant hospitality, strong religious convictions—of inflexible integrity and a blunt, outspoken sincerity. . . . If Parsons was *suaviter in modo*, Parker was *fortiter in re*. A good standup fight was meat and drink to him.”(1)

Horace Davis (L. S. 1850-51) of San Francisco, Cal., writes:

Parker was rather stiff and formal in manner, but he commanded our sincere respect. He felt kindly to us and *was* kind, but he didn't know how to unbend. Parsons was genial and easy in demeanor, rather more of a man of the world, more accessible than Parker, but I don't know that we really liked him any better. Behind the awkward gravity of Parker and his queer flat voice, we felt that he liked us; and we reciprocated it. I called frequently on both Professors at their houses, and was sometimes invited to tea at Judge Parker's. Later on in the term we attended a grand reception at the house of each Professor to which all the students were invited.

Charles R. Codman (L. S. 1851-52), of Boston, writes:

His lectures on Equity were very dry, but his Moot Court opinions were remarkable, wonderfully clear and strong. He was much liked and had a beautiful vein of New Hampshire humor. We considered him the best lawyer of the Faculty.

James E. Carmalt (L. S. 1862-64), of New York, writes:

Parker made *Chitty's Pleading* about as interesting as *Webster's Dictionary*. But then Parsons made ample amends by making the Law of Contracts almost as fascinating as a Dime Novel.

To the same effect writes John D. Long (L. S. 1860-61):

Joel Parker—whose lectures were as inspiring as a Puritan sermon on the metaphysics of the freedom of the will; Emory Washburn, who poured out the chapters of his great big book on *Real Property* in a torrent over his lips, like a brook over rocks in spring time; and Theophilus Parsons, who wrote legal treatises

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(1) *Old Times at the Law School*, by S. F. Batchelder (L. S. 1895-98), *Atlantic Monthly* (Nov. 1902).

almost as fast as his prolific contemporary, Mrs. E. D. N. Southworth, issued her mild novels.

Right Reverend Charles C. Grafton (L. S. 1851-54), Bishop of Wisconsin, writes :

I had begun reading some theology while in the latter year of my stay at Harvard and was looking forward to Holy Orders. "Is it—*facile descensus*—said Chief Justice Parker to me." "No," I replied, "It is—*ascensus*—for the law is the foundation of the Gospel. With what admiration we used to follow his slow, critical, exact analysis in the decision of the cases he presided over. In his kindness of heart, he once relieved my youthful mind as to my ability to enter the legal profession. A difficulty presented itself to my mind on the application of certain principles of law which seemed to be in conflict. It was a subject he was lecturing on. After long puzzling over the matter, I gave up in despair the attempt to solve the difficulties. I began to think I was unfitted for the profession. In much tribulation I ventured to approach the Chief Justice, and with trembling knees, I knocked at his door, and presented myself before him. He raised his spectacles, and said "What is it Mr. Grafton?" I stated the case, and the two lines of argument on either side. "Please," I said, "Tell me what the law is." He had listened with a semi-curious smile, and when I had finished, he said (And Oh! What a relief it was to me) "Mr. Grafton, I am old enough to say 'I don't know'." I went home happy.

Ex-Senator William E. Chandler (L. S. 1853-55), said (1) :

Parker's opinion on a law point was final with us—greatly respected—a sound and learned lawyer. He moved slowly to the opinion which he expressed, when lecturing on unsettled questions, or when deciding Moot Court cases—and he seemed to take as much pains, and to be as conscientious in reaching his conclusion, as if they involved final judgments in actual litigation. Necessarily, therefore, he had, in a remarkable degree, the respect of his pupils; and as he was as modest and kind hearted as he was learned, he also gained their warm affection. His moral courage was as great as his modesty.

John D. Bryant (L. S. 1855) writes :

Parker's profound learning was enlivened by a sense of humor. In what I think was the closing lecture of the year, Professor Parker gave some advice to the students which he hoped might be of service to them after leaving the School. It was to the effect that at the close of a hard day's work in court, instead of

(1) *Address before Grafton and Coos County Bar Ass. (1888).*

taking home the testimony of the witnesses and reading it over, and possibly looking up the law applicable thereto, the rest of the day and evening should be spent in recreation and rest. The Professor added: "I make this recommendation, gentlemen, with the more confidence from never having tried it myself."

Henry N. Blake (L. S. 1856-58), Judge of the Supreme Court of Montana, writes:

Parker's style was not attractive and his lectures were not popular. He committed the error of some teachers who forget that the pupil is to be instructed and is not an equal in learning. But what he said was accepted without a question and with proper respect.

George S. Hale (L. S. 1845-46) wrote(1):

By the law students he was generally looked upon as the deep repository of all legal knowledge. Though he was a man of genial feelings, yet his general manner was one of extreme quiet; and he made no efforts for personal popularity. But he had from all his pupils, at all times, the deepest respect and from those who were so fortunate as to have with him a personal acquaintance, the warmest affection.

As a mere teacher of the general number of young law students, some of Judge Parker's colleagues have been his superiors. To such as were eager laborers in the learning of the law, he was a most valuable instructor. All who ever heard him will recall the quiet and dignified manner in which he entered the lecture room, paying no apparent attention to the short round of applause which by custom had become the ordinary salutation to the Professors on their entrance. His hat was laid by his side. There was no elaborate introduction; an utter absence of ornament, or of any attempt at literary embellishment. But the lecturer's hour was given to the clearest statement of legal principles, the keen dissection of cases, and oftentimes to the warmest discussion of what he deemed heresies of the law. His manner in the lecture room, as elsewhere, was almost invariably one of complete repose. But when defending some of his statements of legal points that might have been at some time questioned, or when attacking principles which he deemed unsound, the tone of his voice would become warm; the manner would still be utterly free from the least approach to violence; but the statement of theories and principles was abandoned, and his discussions took the shape almost of personal combats.

His legal learning was wide and exhaustive. Pleading and constitutional law were apparently his greatest delights;

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(1) See *American Law Review*, Vol. X (1875).

and in the whole country the profession could show scarcely his equal in those branches.

It was said of Judge Parker that, while on the bench, he was occasionally given to deciding cases on points that had escaped the penetration of counsel. . . . The thing certainly did happen not unfrequently in cases heard before him in the Moot Courts of the Law School. His statements of fact in the cases given to the students for argument, were always full and exact, and always fairly showed to a lawyer the points in issue. Yet to the sucklings of the law, by whom the cases were to be argued, the points to be discussed were not always apparent; and there were sometimes humorous scenes, when, after elaborate arguments, laden with Southern eloquence and Western rhetoric, Judge Parker would, in the most courteous and kindly manner, quietly suggest, in his opinion, that there might, by possibility, be points in the case of more controlling power to the judicial mind than those which had been argued.

Were I to indicate that quality in him, writes an old pupil, which impressed me most, I would say he was the most manly man I ever met. No one could be in his presence without feeling the stimulus to noble and high endeavor.

#### THEOPHILUS PARSONS.

While Professor Parker was respected, and Professor Washburn was loved by the students, Professor Parsons was the instructor who most thoroughly interested and entertained them.

As Charles R. Codman (L. S. 1851-52), of Boston, writes:

Everybody was fond of Parsons. He was perhaps more of a man of the world than Judge Parker, and less of a professional man. He was very fond of getting the students around him and giving them reminiscences of Judge Story and Webster, etc. If he came into the library when we were at work there, we all stopped work to see if we could get the Professor to gossip with us, and there was never much difficulty in getting him to do so.

S. F. Batchelder (L. S. 1895-98), a grandson of Professor Washburn, writes (1):

Parsons was a fascinating lecturer, a most genial and social man. I am indebted to Professor Langdell for the following characteristic reminiscence of him: "It was the custom in the old days, on the first day of each term, for the students to assemble in the library for the purpose of meeting the Professors, and listening to an address from one of them. . . . On one occasion, when Professor Parsons delivered the address, he explained to the new students that. . . . they had to study

(1) *Old Times at the Harvard Law School*, by S. F. Batchelder.

English decisions very diligently. 'Do you ask me,' said he, 'if we have not achieved our independence, if we are still governed by England? No, gentlemen, we have not achieved our independence. England governs us still, not by reason of force but by force of reason.' " Parsons was really more of a *littérateur* than a lawyer. He openly expressed his dislike of, and inability for, the more technical parts of the law, such as Pleading and Property. He had a certain poetic dreaminess of temperament that, while apparently not interfering with his professional success, did seriously affect his financial affairs, which constantly suffered from his credulity and over-sanguine expectations. An indefatigable writer of textbooks, he possessed that unusual legal accomplishment,—a charming literary style. He clothed his propositions in such a pleasing form that, like sugar-coated pills of legal lore, they were swallowed and assimilated with the minimum of effort and the maximum of enjoyment. His works were even more popular than Story's. It is said that his *Contracts* achieved the largest sale of any law book ever published. Seven other treatises stand to his credit, on one of which alone he is reported to have netted a profit of \$40,000. His lectures, for clearness, scope, and literary excellence, have often been compared to those of Blackstone. He delighted in laying down broad views of the subject, sometimes carrying his generalizing to an extreme.

Parsons resembled Judge Story greatly in his remarkable powers of conversation. One of his friends and neighbors wrote of him, on his death(1) :

What a wonderful master of conversation he was. With wealth of learning, superior as it seems to me to Johnson's; readiness and quickness equal to his, there was added a brilliant wit to which Johnson could lay no claim; and above all a kindness of manner and sweetness of disposition almost altogether lacking in the reports of John's conversations. Full of apposite anecdote, brilliant witticism and ready yet kindly repartee.

Of his lectures Judge R. M. Benjamin (L. S. 1854-55), of Bloomington, Ill., writes: "Parsons had the rare ability to make his law lectures as interesting as the Lyceum or platform lectures so popular at that time throughout New England."

If Parsons had his faults—if he was sometimes a little superficial, sometimes a little selfish, sometimes a little insincere,—these qualities did not detract from the charm of his lovable

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(1) *Memorial of T. Parsons*, written for the Cambridge Magazine Club, by Gilbert Hawkes, April 5, 1882.

personality, and the fascination which his presence and speech exercised upon his pupils. "I remember the saintly face of Professor Parsons. It was a benediction to be in his presence. He would have well graced a bishop's mitre," writes M. A. Johnson (L. S. 1871-72).

Ex-Senator William E. Chandler (L. S. 1853-55), said :

He was exceedingly attractive to young men. Affluent in language and gifted in extemporaneous speech, he had a wide and ready knowledge of legal principles and precedents. He wrote law books *con amore*, to which he brought—a clearness of statement, and ingenuity of conception and illustration, peculiarly his own. His ever active geniality and his ready command of all his mental resources especially qualified him as a co-worker in the School with his more profound but less demonstrative colleague :

Judge Henry N. Blake (L. S. 1856-58), writes : "Parsons had many arts of a politician, and expressed a high opinion of the Supreme Courts of every State in the Union, on different occasions through the year."

A characteristic bit of his humor is narrated by Charles H. Owen (L. S. 1861-63) :

The students in the lecture room were encouraged to ask questions. A crude, middle aged student, who had already been suspected of getting opinions for use of the firm of lawyers of which he had been formerly a member, once occupied some time in stating a case, and concluded, "If the facts are thus can A sue B?" Parsons answered rapidly and emphatically : "Certainly he can—not the least doubt of it. Would any student like to ask another question?" From the front bench someone asked, hesitatingly, "Could A recover anything?" Parsons answered again rapidly, "Not a cent—not before any competent judge."

#### EMORY WASHBURN.

Of the three Professors, Washburn was the one who took the most immediate and personal interest in the students individually. At his room in Dane Hall and at his house in Quincy Street, they thronged for advice on all kinds of topics, legal, moral, social and political. A very adequate and unexaggerated summary of his work and personality is given by his grandson, S. F. Batchelder, as follows(1) :

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(1) *Old Times at the Harvard Law School.*

His interests were broad and varied. . . . He was a copious writer for the press, and was in constant demand as a speaker. His public spirit was unflagging and direct. Governor Bullock tells of seeing him, during wartime, marching as a private in the "home guard" at a military funeral. When Bullock expressed his surprise at the humble part taken by a former chief executive, Washburn, at that time considerably over sixty years old, replied quite simply, "Oh yes, I have done this often, sometimes at night. I like to help along when I can."

Washburn had an enormous capacity for work. He seemed to have mastered the art of living without sleep. From an early morning hour till far into the night he was to be found at the School in his "private" office. Never was there a more delicious misnomer, for he was deluged with an unending stream of callers, friends, strangers, students, politicians, and clients. Despite them all, however, and the demands of his teaching and practice, he managed to produce a number of professional works of the highest excellence, notably those on *Easements* and on *Real Property*, which, in constantly appearing new editions, continue to be the standards of to-day.

As a lecturer he was delightful. So great was his popularity that it was not uncommon for undergraduates and members of other departments to stroll over to the law lectures "just to hear Washburn awhile." His prodigious power of throwing himself body and soul into the case before him, be it that of actual client or academic problem, joined to his long experience and public prominence, gave assured weight to his words; while his wonderfully winning personality, his genial spirit and his well-remembered hearty laugh gained him the love and esteem of every listener.

Indeed, Professor Washburn will go down in the history of the School, above all his professional excellencies, as pre-eminent for his humanity. Mr. Brandeis, in his sketch of the School, epitomizes him as the most beloved instructor in its annals. Every student seemed the especial object of his solicitous interest. He not only acted as director, confessor, and inspirer of his pupils during their stay in Cambridge, but somehow found time to correspond with them, often for years, after they had scattered throughout the length and breadth of the land.

His lectures on *The Study and Practice of the Law*, which were published in book form in 1871, show clearly the immense regard for the dignity of the profession which he himself entertained, and which he impressed upon his pupils each year. "These eloquent lectures," writes H. E. Ware (L. S. 1868-69), "created high enthusiasm."

Mention has always been made of his remarkable lecture on





*Emory Washburn*



*Professional Training as an Element of Success and Conservative Influence*, before the outbreak of the civil war, and throughout the war, Washburn was constantly inculcating in his lectures the highest ideals of civic and professional morality and standards of conduct.

He demanded much of his students and he received much in return in the line of study. "Work under Washburn we were ashamed not to try to perform with reasonable diligence. Our doubts and lack of understanding were always helpfully assisted, and we were shown where light would be found and on what musty shelves to look for it, he saying, in his quaint, sympathetic way, 'Young man, I could easily explain this point, but it would be much better for you to look it up,'" writes James E. Carmalt (L. S. 1862-64), of New York.

Washburn's sympathy with the trials and hardships of the young, struggling lawyer was very genuine, and he was always reaching out a helping hand to the younger graduates. Mr. Carmalt relates this further incident:

At the end of one of our terms, the student body asked the Professor to devote a special lecture to the students on his early experience as a practising lawyer. After holding us intensely interested for considerably over an hour, he came to his peroration. Then his voice began to give way, and he came to a full stop. He backed up, and started over again. Again he fell down. Abandoning his manuscript and looking over his glasses in the old sympathetic way, "Gentlemen, I thought I couldn't trust myself to express to you extemporaneously my sympathy for you in your future work; and if I could have written as clearly and legibly as many of the papers you have submitted to me, I could have read what I thought was a very proper conclusion of my statement." Our smile was so gruesome, one could scarcely tell who was the most sorry, the teacher or the students.

Rev. A. P. Peabody, on the death of Washburn, penned the following sympathetic characterization (1):

He was a model Professor. He not only met all the requirements of his office with characteristic punctuality, constancy and faithfulness, but he at the same time maintained the most familiar and kindly intercourse with his pupils, receiving them cordially at his private room (which yet was never private) and

(1) *Memoirs of Emory Washburn*, by A. P. Peabody in *Mass. Hist. Soc. Proc.*, Vol. XVIII, (1879-80).

at his house, directing their reading, solving their difficulties, relieving their pecuniary embarrassments, and continuing to render them every service in his power after—often long after—they had left the University. Above all, availing himself of his opportunity as their instructor in the law, he trained them by unremitting precept, and still more by conspicuous example, to the honest, manly exercise of their profession, and to the culture of those traits of moral excellence which alone can make it honorable and noble.

Both Professor Parsons and Professor Washburn were addicted to relating certain stories and using quaint expressions, which, as they were repeated from year to year, gradually became Law School traditions. "Each year," writes Henry H. Sprague (L. S. 1865-66), the class laughed out of sympathy at Professor Parsons' old story of 'Be bold,' etc., and some effort was made in my time to imitate the example of a previous year of receiving the story in dead silence, but it was concluded best not to bother the Professor."

G. W. C. Noble (L. S. 1860-61), writes, "About all I remember of Parsons' lectures was the dramatic way he used to describe 'the ship was a total wreck' ". Others recall his frequent use of the expression, "a forged will is a shadow; the will of a live man, a shadow of a shade." Many of his pupils remember in great detail his frequently repeated but entertaining stories of his father, the great Chief Justice Theophilus Parsons, and of his own acquaintance with William Pinkney (whom he visited when Pinkney was Minister to Russia in 1815), Rufus Choate, Daniel Webster, Judge Story, and Chief Justice Marshall.

Among the peculiarities of Professor Washburn readily recalled by his pupils were the frequent use in his lectures of the hypothetical case, "Now, Mr. X, suppose you marry my daughter M——", and his amusingly Yankee pronunciation of Latin and French legal phrases. So, too, one of the best remembered incidents of Professor Parker's lectures is his unfailing account of how the United States Supreme Court decided his famous *Piscataqua Bridge* case wrongly, because one of the judges was in a hurry to get away from the argument to pack his bag—"the carpet bag decision". His curious pronunciation of words like "parties"—"pareties"—will also be recalled as the reason for the students calling him "Judge Pare-ker."

Details like these may seem insignificant but they were all part

of the life of the School of that generation, and combined with the contrasting individualities of the Professors as shown in their different methods of instruction, left their impress on the students.

Parker was accustomed to taking up a certain number of pages of the text book and lecturing precisely on the questions therein stated. Parsons gave more life to his courses by the introduction of more extemporaneous matter and by eliciting discussion among the students.

Washburn read his lectures from carefully prepared manuscripts, using the text books chiefly as authorities to be cited.

All three of the Professors required at stated times recitations by the students of portions of the text books previously given out to be studied. These recitations were, however, entirely voluntary and optional on the part of the students, and the practice grew up of allotting one of the three divisions of the seats in the lecture room to those who did not desire to be questioned. The loafers and the unprepared, therefore, always took their seats in this right hand section—which came to be known as "Oregon," from its aloofness.

Description of the Professors between 1850 and 1870 would be incomplete without some notice of their constant coadjutor and sometimes tyrant—the janitor of Dane Hall, John Sweetnam. This interesting, arbitrary, genial, obliging, crusty—such are the contradictory terms in which he is described by the students whom he ruled—personage had been born and bred for a parish priest in Ireland. "He had come to this country and fallen upon evil days, being glad to get a job at street digging. President Quincy, passing one day, was amazed at a red head emerging from a trench and quoting, in excellent Latin, the lines from the *Bucolics* concerning the pleasures of the husbandman. He took the orator into his own service, but finding him perhaps too much of a handful, turned him over to the Law School. Here he became an autocrat. His professional duties, as popularly understood, he limited to opening the doors in the morning and locking them at night. He was deeply aggrieved if asked even to replace library books left on the tables, and seizing on the maxim so frequently used in Torts, modified it to suit his own purposes thus: '*Sic utere libris ut me non laedas.*' But he invented other and higher duties. He attended all the lectures, and subsequently gave the speaker the benefit of his criticism, on both delivery and doc-

trine. He exercised a general supervision over all matters connected with the School, and in his later years became a terror to every one in or near it. But he was at last displaced by the wave of reform that swept over the School about 1870."

So he was described by S. F. Batchelder.

In the following chapter, a more accurate account is given of his many labors in the Library.

In the late fifties, he had accumulated considerable money, and owned a house near the Charles River, in which many law students had rooms.

## CHAPTER XXXVIII.

### THE MARSHALL AND OTHER LAW CLUBS.

In one particular side of the social life of the students, Professors Parker, Parsons and Washburn took especial interest,—the promotion of the Law Clubs. These clubs—the Coke, the Marshall, the Kent, the Bracton, the Fleta, and others had been in existence for many years, (the Marshall dating back to 1825 in Professor Stearns' regime) though varying greatly in vigor at different periods of the School. They consisted generally of eight students from each class, who were elected, partly from their social prominence, partly for their legal ability, the latter factor, however, predominating. The meetings of these clubs were held in the library of Dane Hall, and owing to their number were a serious interruption to library work by the students, the Library being occupied practically every night of the week, or afternoon, except on Saturday.(1)

The President's Annual Report in 1850-51 said of these law clubs:

The clubs formed by the students for the discussion of cases and points of law, and in this and other modes aiding each other in their studies, may not have been in quite as active operation as in some previous years, and this is to be regretted as their value is undoubted.

And in 1851-52:

The clubs formed by the students for the discussion of cases and for debate have been numerous, active, and very useful.

And in 1853-54:

The clubs of the students for discussion and debate, and the argument of cases have every facility and encouragement offered them by the Faculty, and have been numerous, and carried on with great energy and success.

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(1) So states a letter from Professor Parsons to the Corporation Dec. 21, 1852, advising the increase of the salary of Mr. Sweatnam the janitor of Dane Hall, from \$30 to \$40 per month.

And in 1856-57:

The students continue to form many clubs for discussion and debate, and for the argument of cases. The Faculty regard these clubs as eminently useful, and provide rooms for them, and books and attendance, and all other facilities and encouragement in their power. . . .

No detailed account of most of these early law clubs can be given, for their record books, if any such were kept, have all disappeared. From letters received by the author from men who were students between 1850 and 1870, it would appear that the clubs were largely made up according to previous affiliations of the students, men from the same college joining the same club, thus the Kent Law Club was largely composed of Yale students.

J. C. Douglass (L. S. 1855-57) writes (1908):

In 1856-1857 there were several law clubs among the students. Of these the Marshall and the Coke were considered the best, and the membership therein the most desirable. I was a member of both these clubs, and cannot speak from personal knowledge of the others. Our clubs were for the benefit of the members only, they were chiefly for debate, and the consideration of legal and constitutional, and occasionally of Political questions. The debates were earnest and spirited, though orderly and dignified. As at that time the questions of slavery and free soil overshadowed all others in Congress and among the people, so their discussions in the clubs were inevitable.

C. C. Grafton (L. S. 1851-54) writes (1907), that Langdell got him into the Coke Club in which there were then Joseph G. Choate, W. G. Choate, James C. Carter, W. E. Chandler, George O. Shattuck and William H. Herbert.

Charles R. Codman (L. S. 1851-52) who also belonged to the Coke Club with Langdell writes:

We usually argued some case that was on the Moot Court docket, but which had not been decided. The student who was judge gave his decision immediately after the argument. Sometimes he made a wrong decision, or at least it was not the decision of the Professor when the case was argued in the Moot Court, and when it was the reasons were apt to be very considerably different from those given by the Club judge—all of which was a source of much amusement.

E. W. Kittredge (L. S. 1855-56) writes (1907), that he was







C. J. Bonaparte, Roger Wolcott, G. A. Goddard      H. W. Swift      J. C. B. Woods      A. L. Huntington      W. C. Loring  
Superior Court of the Pow Wow, 1873

a member of the Coke Club which then included John D. Washburn, Robert S. Rantoul, George Bliss, Henry Crawford, Rufus Choate, Jr., David H. Coolidge, W. G. Boardman, Leavitt Hunt, and Robert Treat Paine.

By a lucky chance, the Record Book of the Marshall Club, containing its proceedings between 1860 and 1876, has been preserved and placed in the hands of the author by the Secretary of the Club (1875-76), Henry P. Starbuck of Santa Barbara, California. Mr. Starbuck writes that the Club "was killed by the superior prestige of the Pow Wow (founded in 1870) which enabled the latter club to draw off the former's members." As the book contains the autograph signatures of many lawyers, since famous, and also a full account of the methods on which the club of those days was carried on, a somewhat full résumé of the records cannot fail to be of interest.

The first two pages of the book contain the following statement:

In or about the year A. D. 1825, certain students of the Dane Law School, desirous of improving themselves in the study of the Law and fitting themselves to become more ready in argument and more thorough in research, and at the same time, desirous of cultivating friendly intercourse and social amenity one with the other, organized themselves into a Law Club or society, and adopted as their distinguished appellation the name of the Marshall Club, thus appropriating to themselves the name of the eminent Chief Justice, in order that they might ever keep in mind his legal characteristics, perfect fairness, as a judge, and thorough and well balanced investigation as a lawyer. Since which time, this Club has prospered, governed by its traditionary rules, which, like the Common Law, vested firmly the right of question at the present day.

The present members of the Club, while yielding to no one in respect for the antiquity of their society, or the dignity of its traditions, have deemed it expedient, owing to the constant changes among the members of the Club, necessarily arising from the nature of the Law School, to establish a written Constitution and Laws, thus confirming by a Civil Code, as it were, the Common Law under which the Club has for so long a period existed.

In accordance with such determination, at a meeting of the Club held on the tenth day of September, 1857, Mr. J. C. Heywood of Washington, D. C., in the chair, a committee of three consisting of Messrs. C. F. Child of New York, Wilder of Massachusetts, and Williamson of Maryland were appointed to prepare such constitution and laws. On the fourteenth day of Sep-

tember A. D. 1857, the report of such committee was accepted, and after some amendments adopted as the Constitution of the Marshall Club.

The first three Articles of this Constitution were as follows :

Article I. This Club shall be called the Marshall Club.

Article II. The objects of this Club shall be the promotion of legal knowledge and friendly intercourse between its members.

Article III. The members of this Club shall be students in the Dane Law School, and any member of such Law School may become a candidate for membership of this Club.

The senior member of the Club was always President and a clerk was elected each term by ballot, no member to hold the office twice. The meetings were held every week at 3.00 P. M. or 4.00 P. M., generally on Wednesdays, the call for the meeting being posted by the clerk, two days in advance, in some conspicuous place in Dane Hall. It was the clerk's duty, also, to assign two members to argue a question of law for the next meeting but one and to appoint some member to sit as judge. On the counsel thus assigned fell the duty of selecting a case for argument and of copying into the Club Record Book a statement of the facts of the case and delivering a statement to the judge. The Record Book was then to be deposited with the Librarian of the School for the inspection of the Club members before the day of argument.

The number of members was twenty-four and on an election two blackballs excluded. If a member absented himself from meetings for three consecutive weeks he was censured, and if for five, he was requested to resign, "that his place may be filled more worthily". Provision was also made for an "honorable dismissal" in case a member wished to resign. Strangers might be introduced at Club meetings provided the members introducing "shall be responsible for such stranger's observance of the ordinary rules of parliamentary decorum". From this latter provision it would seem as if the arguments at the meetings occasionally became heated.

Among the members of whom any written record first exists, in the September term of 1860, are to be found the following well known names: John C. Gray, John D. Long, John C. Ropes, Edward W. Hooper, and Jeremiah Smith.

The first recorded case is *John King v. Samuel King*, in eject-

ment—a question of presumption as to survival. It was argued by E. R. Robinson for the defendant, John C. Gray for the plaintiff. Judge J. W. Stephenson found for the defendant, basing his decision on a statement of Professor Greenleaf, and a Massachusetts case in 8 Metcalf—Gray (now Professor in the Law School) thus losing his first case.

The next case argued was an actual one, which had been tried before Mr. Justice Dewey of the Massachusetts Supreme Court in 1858—*Richmondville Union Seminary v. Hamilton Manufacturers Insurance Company*. Two noted lawyers argued it—John D. Long for the plaintiff, John C. Ropes for the defendant. The plaintiff won in an elaborate opinion delivered by George A. Torrey, Judge.

In the third case, John C. Gray sat as Judge but omitted to record his decision.

The rights of a finder were settled in a long, nine page opinion by Judge Francis Markoe Bache in a trover case, argued by Edward W. Hooper against James A. Rumrill.

Jeremiah Smith (now Professor in the Law School) won his first case but lost his second case when arguing before Judge Albert Stickney.

In 1861, Judge Charles H. Woodbury again decided a case against John C. Gray for the defendant; but record is made that in trial of the same case before Professor Washburn sitting in the Moot Court, the Professor decided in Gray's favor, on a point in pleading.

In March, 1862, is found an opinion by Judge William E. Perkins, commenting on the negligence of counsel, Richard M. Cadwalader and William E. Lamb, for making the statement of the case cloudy and furnishing no briefs to the judge.

In September, 1862, the actual case of *Dole v. Merchants Insurance Company* was argued by J. A. Stephenson for the plaintiff and Charles H. Owen for the defendant, before Judge George B. Young. Judgment was given for the plaintiff on the ground that the capture was by an act of piracy. This was the famous case of a vessel captured by a Confederate privateer commanded by Captain Semmes, in which case Richard H. Dana and Horace Gray, Jr., appeared in the Massachusetts Supreme Court against Benjamin R. Curtis (see 6 Allen 373).

It will be seen from this that, in the midst of the Civil War, the Law Club was keeping abreast of the times.

Among the members at this time may be noted the names of George Gray, Henry James, and Solomon Lincoln, the former first appearing as Judge in an arbitration case in which he found against the defendant, represented by Henry James. He does not appear to have argued any case himself.

In 1863, a number of the cases argued were cases to be later argued in the Moot Courts before the Professors of the School. Among the more noted names were those of William G. Wilson, and William C. Whitney.

In the first term 1864-65 appear the names of Oliver Wendell Holmes, Jr., William Everett, Peter B. Olney, Charles C. Beaman, Jr., Robert T. Lincoln, and Charles Fairchild. No extended record of cases appears however; and Frank W. Hackett, clerk, notes, "Records turned over to me in December, 1865, in somewhat of a muddled condition." The same condition seems to have existed when the records were turned over to Larz Anderson, Jr., clerk in January, 1866.

In 1866, among the more prominent members were Moorfield Storey and J. Q. A. Brackett; and the records were written up in a full and precise manner by William A. Munroe, clerk, although the spreading of the judge's decision in full on the records appears to have been abandoned by this time.

An average of 12 to 14 members appear to have been present at the meetings.

The following vote was passed:

Believing that the benefits resulting from the Marshall Club will be increased and its usefulness extended by some addition to its present forms of proceeding therefore *Resolved* that when practicable the cases argued shall be those which are to be discussed in the regular Moot Courts.

It was also voted to have four counsel in each case and to allow each counsel forty minutes for argument.

In 1868, record is made that the meetings were held in the Lecture Room of the School. The attendance during the past two years had grown smaller; and in June, a meeting was held at which only two students were present.

About this time, the meetings of the Club appear to have occurred irregularly at one, two, three and four o'clock in the afternoon. In 1869-70 appear the names of Frederic Dodge (now

United States District Judge) Austen G. Fox, Samuel Hoar, and James Barr Ames. A great revival in attendance appears to have taken place on May 2, 1870, the remarkable case of *Hans Schimmel-pfuringreichtzigh et al v. Gustav Schneider* was argued by Hoar for the defendant and J. T. Hoague for the polysyllabic plaintiff, before Judge James Grier. And in the case of *Buffles v. the State*—Austen G. Fox won his first case, against Robert C. Lincoln, before Judge Talbot J. Albert—the question being whether the jury could judge law as well as fact in criminal cases.

On Jan. 9, 1871, James Barr Ames argued his first case against Russell Gray, before Judge Henry G. Pickering but the records are a blank as to the winner. His next case, two weeks later, against Frank D. Lewis, he lost.

In 1871, appear the names of Franklin G. Fessenden (now Superior Court Judge in Massachusetts), Edward Q. Keasbey, and Joseph D. Brannan (now Professor in the Law School).

In 1872, the constitution was amended so as to provide for a court of four judges who should deliver their opinions seriatim at the same meeting at which the case was argued. If the court was evenly divided, the opinion of the Chief Justice previously appointed by the clerk should prevail. In March, 1872, the clerk, George H. Adams, records the delinquency of Judge Joseph B. Warner as follows—"After the reading of the minutes and a great deal of time totally and wholly wasted and lost in waiting for the appearance of Mr. Justice Warner, etc., etc."; and again at the next meeting the "honorable court" was censured for keeping the Club waiting.

In 1872, appear the names of William Caleb Loring (now Judge of the Massachusetts Supreme Court); Charles J. Bonaparte, and Yoshikatsu Enouye. It appears that Mr. Justice Loring won his first case in an action of horse warranty against Philip S. Stone, the court consisting of Nathan Cutler, C. J., and Franklin G. Fessenden, Roland C. Lincoln, and William W. Vaughan, J. J.

The Club, in 1873, had a most precise clerk in the person of George A. Goddard, who carefully wrote out a full statement of the facts of each case argued; and the cases appear to have all been of practical import. In October, 1873, the time for the meeting of the Club was changed from 2 in the afternoon to 7.30 in the evening. By December, 1873, it had apparently been found difficult to get men to serve as counsel. Accordingly a vote was

passed that any member appointed as counsel *must* serve or provide a substitute, the penalty for neglecting to do so being resignation from the Club. A year later, this penalty was changed to a fine of fifty cents. The records now begin to be very scanty, and the resignations so frequent, that in October, 1874, it was voted to give preference in elections to first year men.

It is apparent that the other Law Clubs, notably the Pow Wow, were coming to the front; and "a comparison of a list of its members with a list of the members of the Pow Wow might show that the former club was killed by the superior prestige of the latter which enabled the latter Club to draw off the famous members." (1)

In December, it was voted to hold meetings in the private room of members. Nov. 15, 1875, the Constitution was thoroughly revised with the following praiseworthy preamble:

Wishing to gain a more thorough knowledge of law, and greater readiness in the use of such knowledge, we hereby form ourselves into a club.

The Club was split up into two Courts, a Supreme and a Superior—the former to consist of eight members taken from second year men, the latter of eight first year men. Members of the Supreme Court were to preside in turn over the Superior Court and to give out the cases for argument. The Supreme Court also was to decide all cases brought before it on appeal. The members of the Superior Court who were not acting as counsel were to form the *puisne* judges at each sitting of that court; and to deliver their opinions *seriatim* each one acting in turn as senior *puisne*, whose duty it was to deliver the first opinion and to enter a report of the case on the records. The presiding Supreme Court judge was to deliver the last opinion and if the court was divided, his opinion was to decide the case. Pleadings and briefs were to be handed to the Chief Justice three days before the sitting; and each counsel was allowed forty minutes for argument. Pleadings, except that of the general issue were to be according to the usage of the English courts, prior to the Rules of 4 William IV. Vacancies in each court were to be filled by unanimous vote of the court. The retiring Supreme Court was to elect three members of the next Supreme Court which three were

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(1) Letter of Henry P. Starbuck to the author.



to elect the remainder of the court and also the first three of the Superior Court. Meetings of the Superior Court were to be held on Monday evenings at eight o'clock. Absence at two meetings was to sever a member's connection with the Club.

The first case argued under this new system occupied from eight o'clock to half past eleven in the evening. On the third case, the plaintiff was given judgment by default owing to the neglect of the defendant's counsel, H. G. Webster, to file his pleadings and brief in time. On his motion to remove the default because "of the previous loose custom of the Club in this respect and his want of knowledge of the provisions of the Constitution," John S. Patton, C. J., delivered the opinion of the Court, overruling the motion because of the bad precedent to be set by granting it. In January, 1876, occurred a case which was hotly argued until midnight by John A. Wyckoff and W. E. Wilmer, Horace E. Deming as Chief Justice delivered an elaborate opinion.

The last case argued in the Marshall Club of which any record exists, was *Sharpe v. New Bedford R. R. Co.* on April 25, 1876, Frederick P. Fish for the plaintiff, James R. Carey for the defendant, in which Fish lost,—an elaborate opinion given by Horace E. Deming, C. J., tracing the history of the fellow servant doctrine.

The record states that the Court rose at 12:30 A. M. Whether after this late (or early) rising, it ever sat again, no record is extant to tell.

#### OTHER LAW CLUBS.

Although somewhat out of chronological order, it may be of interest to describe at this point the law clubs of later days.

In the College Catalogue for 1873-74, in the description of the Law School, it is said:

Nearly every member of the School belongs to one or more law clubs. These clubs, numbering twelve and upwards in all, generally consist of about 10 or 12 members each, and meet once a week for argument and decision of moot cases.

The cases are invariably pleaded by the counsel in the first instance, and the questions argued and decided on such as are raised by the pleading.

The students are resident in Cambridge, and the work of the School constitutes their chief occupation and interest. Questions relating to their common pursuit are constantly the subject of

conversation and discussion among the members of the School; and the stimulating and invigorating effect of this constant social intercourse among a large body of educated and highly trained young men cannot be over-estimated.

These clubs gradually grew in numbers to such an extent and the interest taken and the amount of work expended in preparation of the club court cases by the student increased so largely that they detracted from the value of the Moot Courts. The students became more and more unwilling to prepare their Moot Court cases thoroughly, and attendance fell off.

Professor Gray said in a discussion before the American Bar Association in 1892:

The Moot Courts are not very successful. I wish they were more so. It is well for the students to argue in a somewhat more formal manner as they will before the faculty, rather than to confine themselves to their clubs. Moot Courts used to be compulsory, but there were so many excuses that we have given up the compulsion. They are rather dwindling. We have experimented with practice courts. Last year we tried Mrs. Maybrick with a jury from the undergraduates and it was quite successful. But to make that kind of thing a success is pretty hard work for the Professor who has to get up the evidence on both sides.

In 1879, the students had lost interest so largely that the Moot Courts were suspended. After that year, they were resumed but with little vigor. Finally the Faculty became convinced that they had ceased to be of importance in the work of the School, and in 1897 they were finally discontinued. The Law Clubs became, however, correspondingly more vigorous; and Professor Gray said in 1892:

So far as the clubs go they have been a great success. I think there is nothing connected with the Law School that has been more distinctly an improvement than this matter of student clubs to argue cases. When I was in the Law School or when my friend Judge (S. E.) Baldwin was there, there were clubs, as he says, but each club was carried on by practically three persons, one student on each side to argue and one student to sit as judge. And the rest of the students took very little interest in it.

The oldest surviving, and in many ways the most prominent, law club has been the Pow Wow. It was founded in 1870, the original members being Leverett Tuckerman, Horace Binney Sargent, Frederic Dodge, James H. Bowditch, Augustus P. Loring,

George H. Adams, Russell Gray, Brooks Adams, and Artemas H. Holmes. Austen G. Fox and James Barr Ames were chosen later in the year to fill the vacancies due to the departure of Holmes and Dodge.<sup>(1)</sup>

The Club met in the rooms of Brooks Adams in Wadsworth House. The cases were argued at first by one counsel on each side before six puisne judges and one presiding judge. Later practicing lawyers were frequently asked to preside, Oliver Wendell Holmes, Jr., and Nicholas St. John Green among others.<sup>(1)</sup>

On April 4, 1896, this Club celebrated its 25th Anniversary by a dinner at the Hotel Vendome in Boston, at which Professor James Barr Ames presided; and Austen G. Fox (L. S. 1870-71), Herbert C. Lakin (L. S. 1894-96, 1897-98), Joseph B. Warner (L. S. 1871-74), William F. Corliss (L. S. 1894-97), A. Lawrence Lowell (L. S. 1877-79), Sherman Hoar (L. S. 1882-84), Judge Franklin G. Fessenden (L. S. 1870-73), Charles E. Grinnell (L. S. 1874-76), Henry L. Stimson (L. S. 1888-90), William H. Rand, Jr. (L. S. 1888-91), Gordon K. Bell (L. S. 1893-96) were the speakers. The Committee of Arrangements were Henry Ware (L. S. 1893-96), William F. Corliss (L. S. 1894-97), Robert G. Dodge (L. S. 1894-97), Roland Gray (L. S. 1895-98), W. Rodman Peabody (L. S. 1895-98).

In 1901, the 30th Anniversary of the Club was celebrated by a dinner at which it was stated that the number of members living was 308, deceased 31—total 339.

On April 7, 1906, the 35th Anniversary of the Club was celebrated by a dinner at the New Algonquin Club in Boston at which Augustus N. Hand (L. S. 1891-94) was Toastmaster. The speakers were Prof. James Barr Ames (L. S. 1870-73), Judge William C. Loring (L. S. 1872-75), Camillus G. Kidder (L. S. 1873-75), Samuel B. Clarke (L. S. 1874-76), Judge Francis G. Lowell (L. S. 1877-79), Francis J. Swayze (L. S. 1880-81), Elihu Root, Jr. (L. S. 1904-06), Arthur A. Ballantine (L. S. 1905-07). The Committee of Arrangements were Gilbert Bettman, Grenville Clark and Earnest Everett Smith.

On the menu card, it was stated that the number of members living was 348, deceased 33,—total 381.

(1) See letter of Russell Gray of March 13, 1894, in possession of Prof. J. B. Ames.

(1) See letter of Artemas H. Holmes of New York, partner of George H. Adams, dated March 7, 1894, in possession of Prof. J. B. Ames.

Within six years after the foundation of the Pow Wow, a number of similar clubs had sprung up. Most of them followed the general scheme of the Marshall Club, before described, having a Superior Court of eight first year men, presided over by a Chief Justice, who was generally a member of the Supreme Court which consisted of eight second year men.

The Pow Wow had a third Court termed the "Chamber", to which belonged all its graduates. Later, after the adoption of the three year course in the Law School, some of the more prominent law clubs instituted third Courts, known as the Courts of Appeal and consisting of third year men.

In 1876-77, the leading law clubs were the Pow Wow, the Ames Pleading Club and the Washburn Club, each of which had two Courts; the Bradley Pleading Club, the Dane Law Club, the Tory Club, the Common Law Club, the Lotus Club, each of which consisted only of men of one class.

In 1880, the prominent club named the Thayer Club was founded by members of the First and Second Year classes. Its history is thus given by its present clerk, Walter H. Pollak:

Since that date, it has had a continuous career without change of name or form, surpassed in length by only one of the other law clubs. The organization was honored not merely by the name of Professor Thayer, but by his friendly interest throughout the remainder of his generation-long association with the school. Each newly elected member of the Club is to-day presented with a copy of the well-known etching of Professor Thayer by Mr. Sidney Smith of Boston.

The two hundred and seventy-five graduate and undergraduate members of the Thayer Club include representatives of substantially all the leading colleges and Universities of the United States and Great Britain, and have their homes in most of the American States and some of the countries of Europe and Asia. From the first the number of members elected to each court has been eight; for special reasons some courts have raised the limit to ten or even twelve.

The first regular meeting is generally held about the first of November, and it is always sought to bring the discussion and decision of cases to a close before the first of March. The meeting place for the last few years has been, through the courtesy of the editors, the sanctum of the *Harvard Advocate*. Each member of the First Year Court is given three cases in the year; careful provision is made to prevent any two members from being twice opposed to one another. The average interval between the cases of any member is about a month, and a certain effort is





Choate Chapter—Phi Delta Phi

made to secure for everyone some practice as counsel, in different arguments, for the prosecution and for the defense. Cases are assigned three weeks, and briefs for one week, in advance of the trial. The selection of cases for argument falls to the Chief Justice, who is regularly a Professor in the School or a member of the Second or Third Year Courts; more rarely some member of the legal profession not presently connected with the School officiates. The decision is represented by the majority vote of the Court, which consists of the Chief Justice and the six members of the First Year not involved as counsel in the case at bar. In the first case of each year one Second Year student on each side acts as senior counsel; in all the succeeding cases the argument is conducted by First Year men alone. The cases assigned, the briefs of prosecution and defense, and statements of the decisions rendered, are collected, bound, and deposited in the library of the Law School.

In the spring of the year under the auspices of the Thayer Club Association, the graduate organization, and under the presidency of the *Clericus Antiquissimus*, (Mr. A. P. Cushing, the clerk of the original Supreme Court) is held a dinner for all Thayer men. Those present are by established custom expected to bring the distinctive steins of their year; and this occasion affords an opportunity for the receipt of notices from Thayer men everywhere of their address and such achievements as find a place in the catalogue published every few years by the Thayer Club Association.

There are at the present date (1908) about fifty Law Clubs, of which the more prominent are the Ames-Gray, Williston, Kent (founded in 1893), Austin, Choate, George Gray, Harlan, English 6 (founded in 1895), English 30 (now the Bryce), Holmes, Hamilton, Langdell, Moody, Parsons, Smith, Story, Westengard, Witenagemot and Wyman—all of them organized on much the same plan as the Marshall Club of earlier days.

Professor Dicey in his *Teaching of English Law at Harvard* (1) laid great stress on the value of the training in argument obtained in the Law Clubs, but, he said, "the practical advantages obtained from the Law Clubs and Moot Courts sink into nothing compared with the benefit which these institutions confer upon students by kindling ardent interest in legal problems."

Besides these clubs, there is a chapter of the Phi Delta Phi Society organized in the School for more largely social purposes.

(1) See *Howard Law Review*, Vol. XIII (Jan., 1900).

## CHAPTER XXXIX.

### THE LAW LIBRARY 1845-1869.

The total cost of the Law Library to August 31. 1846, as stated by the College Treasurer, had been \$32,493.87.

At that date, the Library consisted of about 11,000 volumes, very complete according to the standard of the day, and far more ample than any other in the country.(1)

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(1) An adverse criticism, however, is to be found in the *American Jurist* October, 1841, severely commenting on alleged extravagant statements and claims made as to the Library, by W. R. Woodward, in the preface to the second edition of the Library Catalogue, in 1841.

"The publication of this catalogue enables us to judge, in some sort, of those means of obtaining a law education, in the Law School at Cambridge, which are independent of the personal labors of the distinguished Professors of that institution. In the departments of English and American law, little perhaps is wanting; but, in some departments of general jurisprudence, much is to be desired. In the department of Roman law, for example, we find none of the modern works, with the exception of the unfinished English translation of Savigny's history, by Cathcart, and a French translation of the same work, and the newly discovered fragments of Gaius; and, yet, in no department of jurisprudence, has the present century produced more or more valuable work. We venture to say, that, with the exception of the *corpus juris* itself, there is hardly a single book in the Law Library of Harvard College, which a modern Professor of Roman Law would think of putting into the hands of his pupils. We desire not to be misunderstood. The works on Roman Law, in this Library, are undoubtedly valuable, and well deserve a place there; and the same may be said, and for much the same reason, of Bracton, Glanvil, and the year books; but the former are as little suited to the modern student of the Roman law, as are the latter to the student of the Common Law. . . . In modern works on the Roman Law, the library of the Boston Athenæum is infinitely richer, though that, we believe, has received no accessions in this department, within the last fifteen years. In Criminal Law, and prison discipline, the works on which, produced in continental Europe within the present century, would, of themselves, constitute a large collection, the Library is almost entirely deficient; and, of all modern works of public law, and the philosophy of law, we find few or no traces. Of all the countries of Europe, or, indeed of the world, Germany now produces the greatest number of works on jurisprudence and its kindred topics, which are almost all of them written in German; and, yet, astonishing as it may seem, the Law Library of Harvard University,—among the first, "perhaps in any country as a collection of general and municipal jurisprudence,"—containing a nearly complete collection "of European continental law," from the earliest times down to the eighteenth century,"—and furnished with the "most valuable" among the latest "continental law books and legal reviews,"—as Mr. Woodward would have us believe,—does not, so far as we have been able to discover from the catalogue before us, contain a single work in the German language!

In what we have said, it has been far, very far, from our intention, to



After Judge Story's death, the expenditures for the Library rapidly fell, and its size increased very slowly, and almost entirely in the direction of text books for use by the students.

This was due, partly to the fact of its completeness, partly to lessened interest taken by the Professors, but chiefly to the large yearly deficit in the Law School account from 1856 to 1866, to the loss in attendance of students during the war, and to the decrease in the Bussey income after 1865. The strictures therefore, made in after years on the Professors of this period for the low state into which the Library was allowed to drop, were, in reality, hardly justifiable.

The number of books in the Library was stated by the various Visiting Law School Committees, in their Reports to the Overseers, and by the Librarians, as follows: Jan. 22, 1846, 10,000; by the Librarian, Dec. 24, 1855, 15,300, of which 9,500 were in the general library, 2,300 text books for students, 3,500 deposited in Gore Hall, 1,000 belonging to the Commonwealth of Massachusetts; in 1858, 15,000, of which 8,030 were in the general library, 4,000-5,000 were text books, 700 belonging to the Commonwealth; in 1861, 8,851 in the general library; in 1862, 9,334 in the general library and 3,349 text books; July 10, 1863, by the Librarian, 9,502 in the general library and 3,123 text books, 406 superseded text books—total 13,038; Aug. 1, 1864, 9,594 in the general library and 3,159 text books, 311 superseded text books.(1)

The amounts spent for books were as follows:

1845-46.....	\$3,252.05	1857-58.....	\$ 593.00
1846-47.....	1,423.52	1858-59.....	323.06
1847-48.....	1,085.54	1859-60.....	1,330.95
1848-49.....	599.77	1860-61.....	929.67
1849-50.....	684.13	1861-62.....	1,542.31

undervalue the Law Library of Harvard University, or to find any fault with the distinguished gentlemen, who have charge of the School with which it is connected, for the deficiencies we have pointed out. . . ."

(1) The large number of text books for the use of students reflects the increase in the size of the classes and in the number of text books studied; thus in the Report of Jan. 13, 1852, it is stated that, of 274 books added since the last Report, 105 were text books; and in the Report of Dec. 24, 1855, it appeared that since the last Report 147 copies of *Parsons on Contracts* had been added to the text book collection.

In 1857 and 1858, the books and statutes deposited by the Commonwealth of Massachusetts under the Resolve of the Legislature of March 31, 1836, were called for and retaken by the State authorities.

1850-51.....	947.87	1862-63.....	904.42
1851-52.....	779.61	1863-64.....	1,157.46
1852-53.....	800.87	1864-65.....	355.32
1853-54.....	1,234.83	1865-66.....	757.71
1854-55.....	1,393.32	1866-67.....	796.39
1855-56.....	750.81	1867-68.....	741.32
1856-57.....	712.56	1868-69.....	1,722.95

There were few gifts of importance made to the Library during this period. Aug. 28, 1847, Professor Greenleaf reported to President Everett a present of about 50 volumes from Alexander Vattermare.(1) In 1848, an interesting gift was made to the Library by the King of the Hawaiian Islands through W. L. Lee (then Chief Justice of the Islands, and a member of the School in 1843-44), reported to President Everett by Professor Greenleaf, March 22, 1848, as follows(2):

The Constitution and Old Laws of the Hawaiian Islands (in English). The Statutes of the same, Vol I, (in English). Report of the case between Ladd & Co. and the King & Gov't. of those Islands (in English).

If you think it proper to make any special acknowledgment of these donations, will you have the goodness either to direct the mode or prepare the form.

The Library continued in the charge of students as Librarians, the choice being made of those men of high rank and other qualifications who needed pecuniary assistance, and the following serving in the position: Eben F. Stone (1846), Mellen Chamberlain (1847-48), William A. Rich (1849-50), Arthur W. Machen (1850-52), Christopher C. Langdell (1852-54), William E. Chandler (1854-56), George M. Hobbs (1856-57), Charles P. French (1857-58), Lucius M. Child (1858-59), Francis O. French (1859-60), James W. Stephenson (1860-62), Alonzo B. Wentworth (1863-64), Edward Auten (1864-68), James A. L. Whittier (1868-70).

Beginning in 1846, the Librarian was paid \$100 a term, by vote

(1) See letter in *Harv. Coll. Papers*, 2nd Series, Vol. XV.

(2) See *Harv. Coll. Papers*, 2nd Series, Vol. XV.

The Corporation voted (See *Records*), March 25, 1848: "That the thanks of the President and Fellows of Harvard College be returned to His Majesty, the King of the Hawaiian Islands, for the donation aforesaid, and that a letter of thanks be addressed by the President to Chief Justice Lee, transmitting a certified copy of this record, and requesting him to lay the same before the King."

of the Corporation Aug. 29, 1846, in addition to the payment made to his predecessor of tuition fees, room rent, etc. In 1847-48, Mellen Chamberlain was given an extra grant of \$251.35; and in 1848-49, of \$300 for special services.(1)

In 1850-51 the salary of the Librarian was increased to \$200; in 1860-61, to \$375. In 1865-66, it was reduced to \$300; in 1866-67, to \$200. In 1868-69, the Librarian received \$320 and an additional grant of \$125.

In 1846, a new edition of the Law Library Catalogue was published, of 354 pages—the result, probably, of the following Report from the Law School Visiting Committee to the Overseers, January, 1847, noting that “the want of a complete catalogue is felt, though application of it to annual examinations must be attended with some difficulty as so many of the volumes are in requisition for the students. But being printed, it would become a guide to those who might be desirous of increasing by donation the already admirable collection.”

The prevailing ideas that the Law Library was brought into existence later under the Langdell régime, and that it was not of much account prior to that time, are readily dispelled by the constant enthusiastic praise of the Library made in the Annual Reports to the Overseers by the various Visiting Law School Committees.(2)

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(1) See letter of Professors Parker and Parsons to the Corporation, Dec. 29, 1848, as to having persuaded Mr. Chamberlain to remain through the present term for \$300 “to promote the interest of the School.”—*Harv. Coll. Papers*, 2nd Series, Vol. XVI.

(2) In 1846, the Committee reported that: “The Law Library is not without reason judged to be the best collection of law authorities in our Union.”

In 1847, it reported: “The Library is in excellent order and preservation,” and that “its present state and progressive increase gave much pleasure to the gentlemen who inspected, assisted as they were by Prof. Greenleaf.”

Jan. 16, 1851, it reported: “The Library is in excellent order. It attracts as it highly deserves the attention of not private individuals alone but public bodies also, and not simply that of our own patriotic countrymen, but also of foreign friends to the progress of juridical, civil and political knowledge. Of this, the donations of the past year, as many of former years afford the proof.”

Jan. 22, 1852, it said that “the Library in its completeness is as honorable to the College as it is useful to the students.”

In 1853, it said that: “The Library exhibited a condition evincing care and diligent use. . . . Considerable difficulty is experienced in procuring the reports of distant States, but the collection in different departments have on the whole, been well sustained as regards completeness, and are seldom behind the latest publication.”

Nov. 20, 1854, it said that “it is believed that its Library is more af-

The subject of the loss of books, however, due to the unrestricted access of the students to the Library, and the slight amount of time which the student Librarians could devote to care of the books, was a matter of great concern to the Visiting Committees. According to the Report of 1847, the missing books numbered 45; Jan. 20, 1848, 11; Jan. 18, 1849, 6; Jan. 1854, 18; Dec. 24, 1855, 197 from the general library and 89 text books; in 1856, the Librarian reported 46 missing. In 1858, the sub-committee of the Visiting Library Committee reported 150 missing, "being 41 more than the total additions during the year."<sup>(1)</sup> In 1861, the Law Librarian estimated the losses at 100.

In the years 1861 and 1862, a somewhat acrimonious controversy arose between the Professors of the School and the Visiting Library Committee, regarding the losses and general condition of the Library. For some years, the Law Library had been visited by two committees—one, a sub-committee of the general Committee appointed by the Overseers to Visit the Library of the University and which, probably wrongly, supposed that it was within its province to visit the Libraries of the Pro-

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fluent of law books in the English language than any other collection."

In January, 1854, it reported the Library "in good condition," and that the sets of English Chancery reports were complete, with the exception of about one year, the English Common Law reports were entirely complete, and the American reports were complete with the exceptions of a few volumes of Indiana, Texas, Arkansas, Louisiana, Georgia, Alabama, South Carolina and Michigan reports (no reports at all from Wisconsin having yet been received). It deplored the absence of books however at periods of examination, in most cases due to negligence, and it stated: "The evil is one for which a remedy should be sought, and an adequate penalty should be provided for the impropriety of carrying any book from the room, without the knowledge of the Librarian, and a register of the title and name of the borrower and date of loan."

Dec. 24, 1855, it reported "little regularity in the management of the books and a general want of neatness and method," and it suggested the appointment of a permanent Librarian in place of "the present imperfect system." (It is to be noticed that this suggestion was not carried out until fifteen years afterwards, in 1870.)

In 1856, the Librarian reported that the English Law and Chancery reports were now complete, and that the American reports were complete, except ten volumes from South Carolina, Texas, Louisiana, Tennessee and Arkansas.

(1) Such a condition, it was said, disclosed "a biblio-furacity. . . deserving of special punishment. . . carelessness not to be distinguished from crime." The Law Librarian explained the situation as arising from the free access of the students to the books from 6 A. M. to 9 P. M.

"This accounts for the opportunity," the Committee replied, "but the question naturally arises whether it is not practicable to establish a standard of honor among the members of the School, which would afford a greater security than bolts and bars."

fessional Schools—the other, the general Committee appointed by the Overseers to visit the Law School.

The report of the sub-committee of the Library Visiting Committee of July, 1861, may be summarized as follows.

An examination of the books in the Library in 1858 had disclosed the fact that in the past twelve years the total losses had amounted to 870 volumes; that since 1852, owing to frequent change of Librarians, there had been few examinations made; that the Law Faculty had instructed the Librarian, Mr. J. W. Stephenson, in July, to make a thorough examination; and that he reported that the whole number of books in the general Law Library to be 8,851; that the College Catalogue stated the number as 15,000; but this included text books for students which were in special charge of the Librarian in a separate room; that another portion of the Library, 400 or 500 duplicate reports, was in Professor Parsons' room; that there was an entire want of shelf lists, shelf marks and alcove designations, and that the Librarian had been obliged to take down from the shelf each book separately and having found its title in the catalogue prepared by him, to check it up. Books were often kept by students, two or three terms "and when turned in are found enriched by marginal annotations." 175 volumes were found missing, of which 6 were reports, and 100 had been lost in the last term.

Your Committee looks upon this state of things as truly alarming; . . . security should be the first law of such a collection. . . . The Librarian is not a librarian in the common acceptance of the term—a keeper of books—for he exercises no special supervision. . . . He occupies his own room and has no immediate connection with the general Library and is not expected to be in attendance at any stated time during the day. From 10 to 11 A. M. his room is open for the delivery of text books; at other hours his time is his own, but he is expected to enter up new books on the list of accessions and to perform some clerical duties for the Law Faculty. The janitor is the executive officer of the Law Library as well as the factotum of the Law School.

When the janitor is not at his meals, has no fires to build, no errands to run for the Professors, no jobbing to do, he is at his post of duty as custodian of the Law Library. It seems hardly just that a person performing such multifarious and responsible duties should have so humble a title. When the janitor is not present, and that is for many and irregular hours during the day, no person has charge of the Library. There is nothing except moral

principle on the part of the tempted to prevent anyone from carrying away whatever he chooses.

The manner in which the rules of the Library are enforced is not adapted to cultivate in the students a high standard of moral principle in the matter of borrowing books. The rules make it the duty of the janitor to notice when he replaces books upon the shelves any missing volumes and to report the same to the Law Faculty "without exception and without delay" . . . . No such reports are made.

The Committee then pointed out that while the rules require that no books should be taken out without leave and record "a few conscientious individuals conform to this rule; but the Librarian said the more felicitous mode is to take the books without troubling the Law Faculty or the Librarian."

The Committee was strongly in favor of reducing the freedom of access to the books by the students; they suggested that the Library never be left without an attendant, that shelf lists be made, that the text books be called in once each year, and that the duties of the Librarian be increased and those of the janitor lessened.

The Law Faculty took considerable umbrage at the tone of this Report, and though adopting shelf lists, declined to restrict the free access to the books.<sup>(1)</sup> The general Law School Visiting Committee in 1862 approved the Law Faculty's position and, the next year 1863, questioned the jurisdiction of the sub-committee of the Library Visiting Committee. For three years this triangular contest raged. Finally, however, in 1864, the number of missing books having fallen to 9, the whole subject was dropped.

In this year, the number of books in the Law Library was reported as 13,064 of which 3,159 were text books used by the students and 311 superseded text books. In 1869, the number was about 15,000 of which at least 4,000 were students' text books.

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(1) See Report of Law Faculty to the Board of Overseers, Dec. 31, 1862, referring to the "somewhat rhetorical and extravagant remarks of the librarian." They stated that they did not believe that the "idea of having a watch of attendants for detective purposes can be had without changing materially the mode of use or by an annual increase of expense equal to the probable hazard of loss. . . . Such watch and ward, by becoming an annoyance would probably increase the hazard of loss or materially affect the attendance upon the School, perhaps both. From the earliest foundation of the School, students have been admitted to a free use of the books, not merely for the preparation of Moot Court



**Dane Hall Library, Looking North**





## LAW SCHOOL REGULATIONS.

Prior to 1846, the regulations adopted by the Law Faculty regarding the administration of the School had been few in number, and simple in character. No copy so far as is known is extant in the official records.

On June 12, 1846, the Corporation appointed President Everett, Chief Justice Shaw and Charles G. Loring, a Committee to revise the statutes of the Law School.

On January 30, 1847, the following regulations were adopted by the Corporation and confirmed by the Overseers, February 18:

## I. General Regulations.

(1) Students are admitted to the Law School on application to one of the Professors of the Law Faculty. No examination nor previous course of study is required; but the candidate must be a graduate of some collegiate Institution or have attained the age of 19 years and he must produce satisfactory testimonials of good moral character.

(2) Every student on entering the Law School shall at his election give a bond to the steward in the sum of \$200 with a surety resident in Massachusetts for the payment of College dues; or deposit the sum of \$150 with the steward, at the Commencement of each term, to be retained by him till the end of the term and then to be accounted for; and no student shall be matriculated till these conditions are complied with.

(3) The students are required to board and lodge at houses in the city of Cambridge licensed for that purpose by the Law Faculty. The rooms in Graduate Hall are assigned to such law students as apply for them.

(4) No public meeting of the students shall be held without express leave of some of the Law Faculty upon written application for that purpose.

(5) Every member of the Law School is expected to conduct himself on all occasions in a courteous and gentlemanly manner. If any conduct of an unbecoming, illegal or immoral character or disrespectful to the Government of the University take place on the part of any member of the School, it shall be the duty of the Law Faculty to inquire into the facts of the case; and they shall be authorized, according as in their judgment the interests of the

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cases, but for prosecution of their studies from hour to hour. This facility of reference is one of the advantages and attractions of the School. . . . If the use of the books is to be restricted it must be by some authority higher than that of the Faculty."

For a spicy account of this whole controversy, see *Law School of Harvard College*, by Joel Parker (1871).

Law School and the circumstances of the case require, to suspend or dissolve the connexion of the offending student with the Institution and to withhold for a time or wholly refuse any certificate or diploma to which he otherwise might have been entitled.

(6) Any member of the Law School knowingly participating with an undergraduate in the violation of any of the laws of the University shall be subject to those laws in like manner as an undergraduate and be liable to the same discipline to be administered by the Law Faculty.

(7) No person whose connexion with the Law School has been suspended or dissolved by the Law Faculty shall continue to board or lodge at any licensed boarding or lodging house without express permission of the Faculty.

(8) Members of the Law School resident in any College hall shall be subject to such regulations for the preservation of good order and discipline as are now or may be established by the University, to be administered by the Law Faculty.

(9) All damage to the buildings, furnishings, or other property belonging to the University by any law student shall be chargeable to him.

(10) No person shall be recommended by the Law Faculty to the Corporation for the degree of Bachelor of Laws in the University or for any certificate or diploma unless he shall have been exemplary in his conduct, diligent in his studies and attendance upon the lectures and exercises of the Law School and have passed an examination satisfactory to the Professors.

(11) Seats are provided in the College Chapel for members of the Law School desirous of attending the religious exercises of the University. For those wishing to attend divine worship in any of the churches of the city of Cambridge, free seats will be provided on application for that purpose to the Faculty.

## II. Regulations Relative to the Library.

(1) The members of the Law School shall have the use of the public Library of the University on the same conditions as other students in reference to the borrowing, care, and return of the books.

(2) The Library in Dane Hall shall be kept open every day in term time, Sundays excepted, during such hours as shall be appointed by the Law Faculty for that purpose. After the hour for closing no light shall be allowed in it, without the special permission of one of the Faculty.

(3) All books borrowed from the Law Library shall be returned on before the Saturday previous to the examination, under the penalty of twenty-five cents per diem for each volume detained after that time; and if any volume be marked or defaced it shall be made good by the borrower to the satisfaction of the Law Faculty.

(4) Their shall be no conversation, debate, or argument in the Law Library.

(5) Every book taken down in the Library by a student shall be returned to him to its place as soon as he has done consulting it.

(6) No books shall be taken from the Law Library or any other apartment of Dane Hall except at hours to be appointed by the Law Faculty and then only after an entry has been made in the books of the Librarian.

(7) No newspaper, nor pamphlet nor any book except law books and books pertaining to questions in law shall be brought into the Law Library or Lecture Room.

The Law Faculty shall have power to make such further Regulations or By-laws not inconsistent with the foregoing as they may deem necessary or expedient, subject to the approval of the Corporation of the University.

October 27, 1855, the regulations were amended by the Corporation by striking out the power of the Law Faculty to make regulations and by-laws subject to the approval of the Corporation, and by adding the following provisions: That it should be the duty of the Librarian to open the Library every morning immediately after commons and close it at 9:00 P. M.; that a student should not borrow more than five volumes exclusive of text books in which his class was studying; that the Law Librarian might lend books to such persons as he deemed proper; that dictionaries, digests, etc., should not be lent except on application to the Professors; that students desiring a degree must give notice in writing ten days before Commencement; that to have his name placed in the catalogue a student must have complied with all requisitions for matriculation; that smoking in any part of Dane Hall should not be permitted.(1)

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(1) See letter of Parsons to President Walker, Oct. 18, 1855. *Harv. Coll. Papers*, 2nd Series, Vol. XXII.

## CHAPTER XL.

### INSTRUCTION AND FINANCES 1845-1869.

#### COLLEGE LECTURES.

In 1847, a controversy arose over one of the most esteemed privileges of the law students—that of free attendance upon the lectures of the College Professors.

This privilege had been held out at the very beginning of the School, in 1817, as one of chief inducements to entrance. During Judge Story's time, the law students had frequented in large numbers and with great interest the courses of the more popular College Professors; and when the project was broached of curtailing this practice, both Story and his pupils had vehemently protested. Never had there been more eminent Professors in the service of the College than in 1847—Asa Gray, in Botany; Cornelius C. Felton, in Greek; James Walker, in Philosophy; Louis Agassiz, in Zoology; Benjamin Pierce, in Mathematics; John W. Webster, in Chemistry; Henry W. Longfellow, in Belles Lettres; and Jared Sparks, in History. (1)

October 9, 1847, however, a Committee of the Corporation, headed by President Everett, made a report recommending that graduate students be charged five dollars a term for each course of lectures attended in the College. Professor Greenleaf at once earnestly objected to this plan as an injury to the School.

For some years, a controversy existed on the subject, in which Professor Parsons took a very active part. Everett's successor, President Sparks advocated the side of the Law School; and the question was finally settled on the basis stated in the Catalogue of 1850-51:

Law students are admitted free to all courses of public lectures delivered to the undergraduates in the University. Upon payment of a fee of \$5 for each course the law students may also attend the lectures delivered in the Lawrence Scientific School

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(1) For a most interesting account of the College Professors of that day see *Harvard Sixty Years Ago*, in *Autobiography of Seventy Years*, by George F. Hoar.

on Zoology and Geology by Professor Agassiz; on Comparative Anatomy and Physiology by Professor Wyman; on Botany by Professor Gray; and on payment of a fee of \$10, the lectures on Chemistry by Professor Horsford. They may also study any one of the foreign languages taught in the University, on payment of a fee of \$10 per annum.(1)

(1) See letter of Greenleaf to Everett, Oct. 9, 1847, *Harv. Coll. Papers*, 2nd Series, Vol. XV.

"The expenses of legal education are already considerably higher than at any other Law School in the country and the advantage of these free lectures is the only inducement many have to come here rather than go elsewhere."

Everett replied to Greenleaf, Oct. 11, 1847, stating that the chief reason for the change was that, as the numbers in attendance at the Scientific School increased, many of its students desired to take College courses, but that it was necessary to charge them a fee; and that hence all the Professional Schools must be treated alike, especially as the pay of the Scientific School Professors was to consist partially of fees received. Moreover, he stated, the law students did not take advantage of their privilege except in the Anatomy and History courses, and he was inclined to think the Law Faculty overrated the value of the privilege, and did an injustice to their own fame, in attributing the attendance at the School to anything other than its reputation and that of its Professors. (See *Harv. Coll. Archives, Letters of the President*).

The Corporation, however, failed to endorse Everett's plan at this time, so far as the College courses were concerned, but provided for the charge of a five dollar fee for attendance at lectures in the Scientific School, and ten dollars at foreign language courses. The law students thereupon petitioned the Corporation to change the hours of some of the popular College lectures so as to allow them to attend without interfering with their law work. This petition, however, was refused; and the Law Faculty was urged by the Corporation to change the hours of the law lectures so that they should thereafter be given between 11 A. M. and 1 P. M., by which arrangement the law students could attend the desired courses of Professor Sparks and Professor Lovering.

See letters of Greenleaf to Everett, Oct. 28, 1847, Nov. 2, 1847; and of Everett to Greenleaf, Oct. 26, 1847, March 15, 1848, Sept. 5, 1848, Sept. 6, 1848. See also letter of David S. King, O. K. P. Greeny and John F. McCarthy to Greenleaf, Oct. 27, 1847, *Harv. Coll. Archives, Letters to the President*.

"At a meeting of the law students to-day, the following paper was adopted and the undersigned were appointed to hand the same to you for delivering to the Faculty of Harvard University.

"The members of the Law School would respectfully call the attention of the President and Faculty of Harvard College to the present arrangement of the 'Public Lectures.' The Law Students are very anxious to attend many of these lectures, but under the present regulations they are obliged to forego their privileges, or sacrifice some of the lectures of their own department. It will only be necessary, they are confident, to intimate to the President and Faculty the disagreeable alternative to which they are forced, and remedy will be applied."

In 1848, Professor Parsons, as soon as he became Professor, took a vigorous interest in the threatened move against free lectures; and in consequence of his opposition the Corporation finally voted for a compromise on Sept. 10, 1848, (and later on July 31, 1849), by concurring in a report made by Jared Sparks, recommending the grant to law students of permanent free attendance at all strictly under-graduate lectures.

## COURSE AND METHODS OF INSTRUCTION.

In 1846-47, the Catalogue stated:

The course of Instruction for the bar embraces the various branches of Public and Constitutional Law, Admiralty, Maritime, Equity and Common Law which are common to all the United States, with occasional illustrations of Foreign Jurisprudence.

In 1848-49, and in each Catalogue through 1869-70, the course of instruction was thus stated:

The course of Instruction for the bar embraces the various branches of the Common Law and of Equity; Admiralty; Commercial, International and Constitutional Law; and of the Jurisprudence of the United States.

The course of Instruction for the Mercantile Profession is more limited and embraces the principal branches only of Commercial Jurisprudence; namely, the law of Agency, of Partnership, of Bailments, of Bills of Exchange and Promissory Notes, of Insurance, of Shipping, Navigation and other maritime concerns, of Sales, and if the students desire it, of the Constitutional Law.

No public instruction is given in the local or peculiar municipal jurisprudence of any particular State; but the students are assisted by the Professors as occasion may require in the private study of the law and practice peculiar to their own State.

The requirements for admission were thus stated in the Catalogue before 1849-50:

No examinations and no particular course of previous study are necessary for admission; but the student must produce testimonials of good moral character.

In 1849-50, and afterwards to 1870, there was added:

The student, if not a graduate of some College, must be at least 19 years of age and produce testimonials of good moral character.

Students may enter the School in any stage of their professional studies or mercantile pursuits. But they are advised, with a view to their own advantage and improvement, to enter at the beginning of those studies, rather than at a later period.

The course of studies is so arranged as to be completed in two academical years; and the studies for each term are also arranged, as far as they may be, with reference to a course commencing with that term, and extending through a period of two years;

so that those who are beginning the study of the law may enter at the commencement of either term, upon branches suitable for them.

Students may enter in the middle or other part of a term; but are advised to enter at the beginning of an academic year, if it be convenient.

They are liberty to elect what studies they will pursue according to their own view of their wants and attainments; but as a general rule it is advisable for them during the first term to confine themselves to few branches as subjects of regular study, giving attendance, however, upon all the lectures.

There were no regular classes, in the modern sense of the word; but in the Catalogue of 1868-69 the following explanation appeared for the first time:

The Senior Class comprises those students who have studied two years either in the School or elsewhere, those who are attorneys at law after one year's study, and those who will be entitled to a degree at the end of the term. The Middle Class comprises those who have studied one year and less than two years, but are not entitled to a degree at the end of the term. The Junior Class comprises all other students.

#### DEGREES.

The rule as to degrees established in 1843, was found to work a hardship on students in other Law Schools who wished to complete their course at the Harvard Law School; for they were given no credit for time spent in study elsewhere. Professor Greenleaf, accordingly, wrote to President Everett, July 30, 1847, saying that students in the New Haven Law School "would prefer to study with us, if the time spent there could be allowed to them," and stating that both he and Professor Kent advised the adoption of a new rule.<sup>(1)</sup>

The Corporation thereupon voted on August 14, 1847:

The time spent in any Law Institution having legal authority to confer the degree of Bachelor of Laws by any student of good moral character, dismissed from such institution in good standing, may be allowed and computed, so far as concerns conferring of the degree of Bachelor of Laws, as if it had been passed in the Law School of Harvard University; provided that the party shall have studied one year in the latter Institution.

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(1) See letter of Greenleaf in *Harv. Coll. Papers*, 2nd Series, Vol. XV.

From 1847 to 1867-68, the rule as to degrees appeared in the Law School Circulars and in the Law School and College Catalogues as follows:

Students who have pursued their studies for the term of eighteen months in any law institution having legal authority to confer the degree of Bachelor of Laws, one year of said term having been spent in this School; or who, having been admitted to the Bar after a year's previous study, have subsequently pursued their studies in this School for one year, are entitled, upon the certificate and recommendation of the Law Faculty, and on payment of all dues to the College, to the degree of Bachelor of Laws.

In 1868-69, the rule was thus stated in the Catalogue:

Upon the recommendation of the Faculty, and on payment of all dues to the College, students will be entitled to a degree of Bachelor of Laws, provided they have studied three terms in this School; or two terms in this School and six months or more in any other Institution having legal authority to confer this degree; or two terms in this School, having been admitted to the Bar after one year's study of law before coming to this School.

Even with this complicated provision, the Corporation had not succeeded in covering all possible combinations of forms of education which were thought proper in order to entitle students to a degree. Accordingly, from time to time, the Professors, in certifying men for degrees, frequently stated exceptional cases, on which the Corporation acted outside the formal rule. (1)

#### GROWTH OF THE SCHOOL.

During the years 1845-46 to 1851-52, owing to the many

(1) Thus on July 15, 1847, the Law Faculty certified certain students as, "having studied law for one year and being legally entitled to admission to the Bar in the State of Maine, afterwards pursued the study of law in the Law School one year, and passed satisfactory examinations, and were admitted to the Bar while they were members of the School." Though such a case was not within the wording of the rule, they recommended that degrees be granted.

See *Harv. Coll. Papers*, 2d Series, Vol. XIV.

Recommendation of a degree was also made to a man who had studied three terms at a Law School in Toronto and two terms in the Harvard Law School, and who asked that his three terms at Toronto be regarded as equivalent to one term here.

A certificate given by the Law Faculty, July 14, 1849 (See *Harv. Coll. Papers*, 2d Series, Vol. XVII) shows six distinct classes of students recommended for degrees—each class having had a different form of education.



Cambridge, Law School.

March 15, 1853.

Dear Sir

We take pleasure in avowing you of our willingness  
to bear emphatic testimony to your uniform good  
conduct, successful industry, & high position among our  
students, as a lawyer & a gentleman, while you  
were in this school; when you entered in February  
1849; and <sup>you</sup> remained here two terms, or one year.

Your obedient servants

Joel Parker

Royall Professor

Theophilus Parsons

Dane Professor

Y.

Melancthon Wake Oliver Esq,  
of Cincinnati



changes of Professors after the death of Judge Story, and to the uncertainties due to the conflict between the Overseers and the Corporation over the appointment of Judge Loring, the number of students fell off considerably; but with the year 1852-53, the attendance increased, until in 1858-59, the average number of students was 151, a greater number than the average in any one year under the Story régime (the highest average number previously in attendance being in Story's last year 1844-45, viz. 150).

The first two years of the war, 1861-62, naturally showed a rapid decline in numbers; but with the year 1863-64, the number at the beginning of the year was 123, the next year 125, and the next year 172; while in the year before the Langdell régime, 1868-69, the number was 138.

It may be seen, therefore, that the School did not substantially decline in numbers from 1845 to 1870.(1)

Notwithstanding the increase in Law Schools, from 9 in 1848 to 18 in 1862, and the agitation regarding slavery, the students for many years before the war came from nearly two-thirds of the States in the United States, and a number from New Brunswick and Nova Scotia.(2)

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(1) Professor Joel Parker, in his pamphlet on the Law School published in 1871, sums up the conditions while he was Professor as follows: "From Jan., 1848, to Jan., 1858, the lowest numbers were 74 and 88, the highest 143 and 150, the average being 101. From 1858 to 1868, the lowest numbers prior to the War were 109 and 126, the highest were 167 and 176; during the War, the lowest in 1862 and 1863 were 69 and 79, the highest 126 and 136; after the War, the lowest were 119 and 128, the highest 168 and 177, the largest number ever in attendance;—average during the whole period, near 129; average, deducting the period of the War, 144. . . . If it be said that there was an increase of population and wealth within the last period, it must be said also that there was a great increase of Law Schools,—quite as many commercial convulsions, which always affected the School,—that after the slavery agitation in 1854, the attendance from the South did not increase, and on the opening of the War, with one or two exceptions, ceased entirely. There had been an average of nearly 30 students from that section. Besides, the War drew heavily from the School to recruit the armies of the Union."

(2) President Walker, in his Report of 1853, said: "This School has become a national institution. Not a third of its present numbers are from Massachusetts, and but little more than half from the New England States." In 1854, he said, "The Law School continues to flourish . . . notwithstanding the increased expenses of living, the pressure of the times and other adverse influences, the number of students in attendance has fallen off but little, standing at present at 143. They are drawn as heretofore from almost every State and Territory in the Union." In 1855, he said, "Almost every State in the Union is still represented in the Law School;" in 1856, "The Law School is still resorted to by students from every section and almost every College in the United States."

The attendance at the School is shown in the following table. The first column gives the number of students as stated in the College Catalogue; the second column gives "the number of law students at the commencement of the Academical Year" as stated in the President's Annual Reports (except in the years 1845-46, 1846-47, 1847-48 when the number given is that of the law students "at the Second Term of the Academical Year"); the third column gives the average number of students present in the School during the year, as reported by the Law Faculty, in the President's Annual Reports; the fourth column gives the number of students as stated, in the Law School Catalogue.

1846-47 (1st term)	126*	102	127	
(2d term)	131-102			
1847-48 (1st term)	117*	131	126	
(2d term)	131-91			
1848-49	103*	103	100	91 (2d term)
1849-50	100*	94	90	103
1850-51	103*	102	100	103 (1st term)
				100 (2d term)
1851-52	108*	104	110	111
1852-53	129*	124	125	133
1853-54	135*	148	148	158
1854-55	128*	143	125	146
1855-56	100*	111	117	118
1856-57	101*	109	115	124
1857-58	105*	121	143	119
1858-59	126*	111	151	127
1859-60	146*	166	161	175
1860-61	139*	157	148	164
1861-62	103	103	123	113
1862-63	89	89	92 (1st term)	92
			80 (2d term)	
1863-64	123*	124	129 (1st term)	
			115 (2d term)	114 (2d term)
1864-65	125*	125	139 (1st term)	
			131 (2d term)	131 (2d term)
1865-66	172	...	177 (1st term)	
			153 (2d term)	
1866-67	157	...	167 (1st term)	
			120 (2d term)	

President Felton, in his Report of 1860, said: "It is a gratifying circumstance that at the commencement of the present term . . . the members of the Law School represented 29 States. Harvard College has grown from a provincial school to a national University, comparing favorably, in point of numbers and courses of instruction, with the Universities of the old world."

1867-68	125	...	125 (1st term) 101 (2d term)
1868-69	138	...	142 (1st term) 115 (2d term)

In the starred years, the College Catalogues were issued in several editions, two, three and four; and sometimes, two editions in each term. In such cases, the figures of the last edition are used. (1)

## FINANCES.

During the period 1845-1870, the financial condition of the School fluctuated considerably.

The balance of \$17,306.36 to its credit in 1845-46 was increased to \$22,118.33 in 1847-48, the highest point reached, prior to 1870. This balance gradually fell off, until, after the investment of \$20,004.03 in the Brattle House property, it was changed to a deficit of \$6,357.47 in 1856-7. Further expenditures on the Brattle House increased the deficit to \$19,035.66 in 1858-59; then it gradually decreased, until the sale of Brattle House to the College for \$15,000 reduced the deficit to \$2,531.94 in 1860-61.

The lessened attendance of students during the War raised the deficit to \$6,043 in 1862-63; after that year, it declined until, in 1866-67, there was a balance of \$710.16; and, in 1868-69, a balance of \$1,670.12.

The tables of receipts from term bills, the amount paid from term bills to the College Library, and the annual balances as shown on the books of the Treasurer, August 31 of each year, are as follows (2):

(1) The Law School Annual Catalogue was first printed as a separate catalogue, distinct from the College Catalogue, in the second term of 1842-43. They were commonly printed near the end of the College terms (generally at the end of the first term); so that the total number of students as given by them differs from the total contained in the President's Annual Reports and in the College Catalogues. Triennial Catalogues of the Law School, purporting to give a complete list of the students since 1817, were published in 1836, 1839, 1842, 1845, 1848, 1851, and 1858.

See *Harvard College Annual Catalogues*, by John L. Sibley, *Mass. Hist. Soc. Proc.*, Vol. VIII, (1865), in which a full list of the Catalogues and totals of undergraduates, and professional students, recorded in each Catalogue, and in each edition, is given; and in which, it is said: "It is not probable that a complete file of the Term Catalogues of the Law School can be procured." See also preface by John H. Arnold to the Catalogue of 1888.

(2) It is to be noticed that from 1846-47 to 1860-61 the Law School was obliged to pay out of its receipts, to the College Library, each year,

Term	Bills	Library	Payments	Balance	Deficit
1846-47....	\$10,825.00	\$1,080.00		\$18,912.13	.....
1847-48....	11,625.00	1,245.00		22,118.33	.....
1848-49....	8,975.00	960.00		19,411.66	.....
1849-50....	8,025.00	865.00		16,777.48	.....
1850-51....	8,690.00	925.00		15,963.89	.....
1851-52....	8,950.00	995.00		14,411.56	.....
1852-53....	12,075.00	905.00		16,484.81	.....
1853-54....	13,675.00	717.50		17,146.31	.....
1854-55....	12,075.00	647.50		17,679.51	.....
1855-56....	9,100.00	475.00		16,462.43	.....
1856-57....	9,600.00	510.00		.....	\$ 6,357.47
1857-58....	10,425.00	562.50		.....	15,145.20
1858-59....	11,897.63	630.00		.....	19,035.66
1859-60....	15,235.27	802.50		.....	17,299.21
1860-61....	13,475.00	722.50		.....	2,531.94
1861-62....	7,780.00	.....		.....	5,338.52
1862-63....	7,950.12	.....		.....	6,043.00
1863-64....	10,915.00	.....		.....	5,003.74
1864-65....	12,180.00	.....		.....	870.93

sums varying from 5 per cent. to 11 per cent. of the amount of its term bills—the sums deducted being supposed to represent the Law School's proportion for use of the College Library by law students. For many years, the Law Faculty protested against this charge, which seems to have been placed upon the School without any direct vote of the Corporation. That body, however, on June 29, 1850, voted:

"That the Treasurer be authorized to reduce the charge to the fund of the Law School for the use of the Library to such a sum as will be equal to \$5 per annum for each student in the School."

In January, 1853, (see *Harv. Coll. Papers*, 2nd Series, Vol. XIX), Professors Parker and Parsons addressed a Memorial to the Corporation urging the injustice of this charge, and saying that they could only think of three possible reasons for it: first, "that it is for benefits received;" second, "that it is our fair contribution to a general and useful expenditure;" third, "that the money is wanted by the College Library, and we have a fund within the control of the Corporation, and they think proper to take it." No one of these reasons, they stated, afforded a good ground for the tax which caused a direct detriment to the Law School,— "our Library is less complete at this time than when we came into office. The reason is that many of our most indispensable works are in series, and the late volumes have not been purchased; and the reason for this is that the money has been taken from us for the College Library, which we ought to have spent on our own."

Jared Sparks wrote to President Walker, Feb. 12, 1853, endorsing this Memorial, and saying: "There seems much force in the argument. In fact I never knew on what principle the Law School was taxed so heavily."

The College Treasurer reported, to the Corporation, March 26, 1853: "The tax is undoubtedly a heavy one on the School, and restricts very much its means of adding to its own Library; and on this Library, its completeness and efficiency, the institution must very greatly depend for success."

Notwithstanding all these strong expressions, the Corporation took no steps to abolish this tax; but it was finally dropped, without apparent formal action, after the year 1860-61.

1865-66....	14,704.75	.....	4,464.55	.....
1866-67....	13,035.00	.....	710.16	.....
1867-68....	10,382.50	.....	2,535.48	.....
1868-69....	11,527.50	.....	1,670.12	.....

Apart from tuition fees, the endowment of the School was still extremely limited. Its receipts other than from term bills were as follows:

(1) The yearly income from the Dane Professorship fund was \$750, until 1866-67, in which year, it was \$552.08. In 1867-68, it increased to \$975; and in 1868-69, to \$687.50.

(2) The yearly income from the Royall Professorship Fund was \$397.18 up to 1866-67, in which year, it increased to \$1,042.50; in 1867-68, it was \$516.34; in 1868-69, \$575.91.

(3) Beginning with the year 1847-48, the Law School received, every third year, the sum of \$151.02 (\$218.98 in 1868-69) as income from a fund of \$2,000 received by Harvard College, in 1839-40, under the will of John Foster, who died in 1836. (1)

(4) Beginning in 1861-62, the School received its share of the income from the magnificent bequest of Benjamin Bussey.

The yearly income from the Bussey Professorship Fund was: 1861-62, \$2,500.82; 1862-63, \$2,802.27; 1863-64, \$2,802.26; 1864-65, \$2,802.25; 1865-66, \$3,195; 1866-67, \$2,400; 1867-68, \$1,700; 1868-69, \$915.33.

(5) In 1868-69, \$5,627.61 was received from the Bussey Trust fund.

(6) Small miscellaneous receipts from sales of books, etc.

The expenditures during these years may be divided into six classes. (2)

(1) Salaries of Professors and Instructors: Professor Greenleaf received in 1845-46 (the year of Story's death) \$1,500 salary, and a grant of \$2,000 additional; in 1846-47, \$3,000; in 1847-48, \$3,000 and a grant of \$500 additional.

(1) John Foster was born in Cambridge in 1782, and graduated from Harvard in 1802. Owing to ill health, he lived a life of seclusion, and largely devoted himself to charity. By his will he left this sum to the College "in trust for the sole purpose of assisting in such manner and at such times as they shall consider best, such students of Theology, Law, and Medicine or either of them, as shall be poor and need such pecuniary assistance while pursuing their preparatory professional studies."

See *History of Harvard University*, by Josiah Quincy, Vol. II.

(2) In 1850, a move was made by the Corporation to secure repayment from the Law School funds of the amount which the College had paid out of its general funds for the erection of Dane Hall and interest—

Professor Parker received in 1848-49, \$3,000, and the same sum each year through 1854-55; from 1855-56 through 1864-65, \$2,000; in 1865-66 and 1866-67, \$3,000; in 1867-68, \$1,500. Professor Parsons received in 1848-49, \$3,000 and the same sum each year through 1866-67; in 1867-68 and 1868-69, \$3,750. Professor Kent received \$3,000 in 1846-47. Professor Allen received \$2,000 in 1849-50. Professor Washburn received in 1854-55, \$750; in 1855-56, \$2,500; from 1856-57 through 1866-67, \$3,000; in 1867-68 and 1868-69, \$3,750. Professor Holmes

a sum then amounting to \$21,980.95. A Committee, consisting of Samuel A. Eliot and Benjamin R. Curtis reported on this as follows:

"With regard to the Law School, it has been so flourishing that within the last twenty years it has accumulated a fund of \$19,000 and upwards, besides paying more than \$30,000 for its Library and \$12,700 on the enlargement of its building, in addition to the salaries and other expenses. This is an average net accumulation of more than \$3,000 a year; and although it will perhaps be necessary to increase its expenditure for Professors' salaries, so as to raise the value of the education there, and thus compensate in some degree for the loss of Judge Story's widely extended reputation, yet there may be a reasonable confidence felt that there will continue to be an annual gain to some extent.

The increase of the Library will require less, and there may be some economy in expenses. But even if there should not be a surplus, yet the prospect is that no long time will elapse before some benefit may be derived from the great bequest of Mr. Bussey; and when it shall be fully received, there will probably be enough to sustain two Professorships or nearly so. With these prospects, the Committee cannot but consider the debt a good one, of which the payment may be expected by installment, which will work no hardship on the School, and will restore an important portion of its funds to the use of the undergraduate department.

In the mean time, they think that a charge for the interest of the principal sum could be afforded by the School. . . . The principal may be also easily refunded . . . by paying a moderate percentage annually. But this may be left till another year or two shall have given evidence of the ability of the institution to do it without inconvenience. The Committee will only add that the Professors recognize the validity of the claim, and will interpose no obstacle to its payment."

Accordingly the Corporation voted on June 1, 1850: "That there be charged interest at the rate of 6 per cent. per annum on the sum due from the Law School to the stock account, as ascertained by the accompanying statement."

Vigorous opposition to this action on the part of the Corporation was made by Professors Parker and Parsons; and they wrote to the Corporation, July 15, 1850, (see *Harv. Coll. Papers*, 2nd Series, Vol. XVI), stating that the statement of the Committee that "the Professors recognize the validity of the claim and will interpose no obstacle to its payment" was inaccurate; that Mr. Parsons had had some talk with Mr. Eliot and Mr. Curtis, but had not fully understood the matter, and that they now "ask leave therefore to express the hope that the Corporation will not proceed to take from the Law School this fund or any part of it, or take any step which will imply or require such transfer, or make any charge on account against the Law School founded on the claim aforesaid, without giving them an opportunity to be heard."

As no further reference to this matter appears in the College Records, it would seem that the proposed refund was not insisted upon.



received in 1868-69, \$3,750. There was paid to the following gentlemen as Instructors—to John C. Adams in 1845-46, \$500; to Benjamin R. Curtis in 1847-48, \$500 for his course of lectures; to Franklin Dexter in 1848-49, \$1,500; to Luther S. Cushing in 1848-49, \$1,000; in 1849-50, \$325; in 1850-51, \$600; to Edward G. Loring in 1851-52, \$500; in 1852-53, \$1,000; in 1853-54, \$1,750; in 1854-55, \$750. Mr. Gurowski received \$100 in 1850-51 for his lectures on Civil Law. Richard H. Dana Jr. received \$1,000, in 1866-67, and \$1,500, in 1867-68, for his course of lectures.

(2) Purchase of Books (See Chapter XXXIX).

(3) Prizes to students, four in number, of from \$30 to \$60, beginning in 1849-50.

(4) Salary of Janitor, beginning at \$300, and raised, in 1849-50, to \$400, and, in 1858-59, to \$475, in 1865-66, to \$500, and in 1867-68, to \$600. In 1867-68, a salary of \$500 was paid to the Assistant Steward of the College.

(5) Salary of Librarian (See Chapter XXXIX).

(6) Insurance, binding of books, etc.

The chief loss to the School came through the unfortunate experiment in the Brattle House, the investment in which was as follows: Purchase of lands and building, \$19,291.50; repairs, furniture, etc., \$12,981.57, \$1,132.33; interest on funds provided by the College, \$3,124.79, \$772.92; total, \$37,303.11.

The income received from rents was: 1857-58, \$2,674.67; 1858-59, \$2,573.02; 1859-60, \$2,010.37; 1860-61, \$752.65; total, \$8,010.71.

The property was sold to the College in 1860-61 for \$15,000. The balance of investment in Brattle House as stated by the Treasurer, Aug. 31, 1861, was \$17,254.87; and this sum represented the net loss to the Law School from this ill-judged venture.

## CHAPTER XLI.

### ELIOT AND LANGDELL.

On May 19, 1869, occurred an event which marked a revolution in the affairs of the Law School, as well as in the other branches of the University—the election by the Board of Overseers of Charles William Eliot as President of Harvard College.

At the beginning of the fall term, President Thomas Hill had resigned, September 30, 1868, and Rev. Andrew Preston Peabody, who had previously served in such capacity, was chosen Acting President.

The members of the Corporation at this time were, John A. Lowell, George Putnam, Chief Justice George T. Bigelow, Francis B. Crowinshield, Nathaniel Thayer, and the Treasurer, Nathaniel Silsbee.

The Board of Overseers comprised John H. Clifford (President), Edward Everett Hale, William A. Richardson, Nathaniel B. Shurtleff (Secretary), L. R. Thayer, R. T. Robinson, John C. Ropes, D. H. Mason, Francis Cogswell, Rev. James Walker, R. S. Rotch, Richard H. Dana, George M. Brooks, J. W. Bacon, James Lawrence, T. B. Thayer, G. W. C. Noble, William Gray, Rev. James Freeman Clarke, Darwin E. Ware, Samuel Eliot, Ralph Waldo Emerson, Seth Sweetser, Francis E. Parker, Henry Lee, J. Ingersoll Bowditch, E. Rockwood Hoar, Francis Parkman, Theodore Lyman, and Charles W. Eliot.

Dr. Peabody was looked upon by many as the natural successor to President Hill. Two members of the Corporation, however, held a different view. It appears that Lowell and Crowinshield, both directors, and the latter treasurer, of the Merrimack Manufacturing Company, a wealthy and prominent corporation, had, three years before, in 1865, been much impressed with the abilities of a young man, a graduate of the Class of 1853, who had been a tutor in Mathematics at Harvard College, 1854-58, Assistant Professor in Mathematics and Chemistry at the Lawrence Scientific School, 1858-66, Assistant Professor in Chemistry at Harvard College, 1861-63, and who had then resigned for purposes of study in Europe. To this young Mr. Eliot, they had

tendered the important position of superintendent of the mill with a salary of \$5,000. Mr. Eliot, who was then in Rome, had refused this offer, however; and accepted, a few weeks later, the Professorship in Analytical Chemistry in the Massachusetts Institute of Technology, which was to be opened October 1, 1865.

Three years had elapsed, but this young Professor was still in the minds of these two members of the Corporation. At Commencement in 1868, he had been elected an Overseer of the College. He was known to be energetic, original, masterful, and progressive. His views on educational matters were vigorous, perhaps even revolutionary; and two articles which had appeared from his pen in the *Atlantic Monthly*, in February and March 1869, entitled *The New Education*, had stirred all who were interested in such problems.

With these facts in mind, and perhaps not averse to making a complete change in the order of things, the Corporation, on March 12, 1869, elected Charles William Eliot, then thirty-five years old, as President of Harvard College,—the youngest President since Henry Dunster, in 1640.

The vote came before the Board of Overseers, March 18, where, owing to the opposition aroused, it was referred to a Committee of four, who, on April, reported in favor of confirming the choice. The Board, however, hesitated, postponed action, and on April 21, referred the matter back to the Corporation. The Corporation stood by its guns; and, on May 19, voted that they remained "unanimously of the opinion that their action in electing Mr. Eliot is adapted to promote the best interests of the University."

Thereupon the Overseers capitulated, and by a vote of 16 to 8 confirmed the election.(1) On the following day, Mr. Eliot wrote to his friend and classmate, Arthur T. Lyman(2):

The vote of yesterday is perfectly satisfactory to me. Two thirds of the board were for confirmation so that it was a fair expression of opinion. As far as I have heard the objection to me, I quite agree with them. As Theodore (Lyman) told Edward (Everett) Hale, "I agree with your general views, only you don't know Eliot." Look out for a long season of debates and a laborious sifting out of wheat by slow degrees.

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(1) See *How President Eliot was elected*, by W. A. Richardson, *Harvard Graduates Magazine*, Vol. VII.

(2) *Harvard Graduates Magazine*, Vol. XII.

The new President attended the meeting of the Corporation May 29, but did not formally assume charge of the College until after the close of the academic year. October 19, he delivered his inaugural address, which contained the seeds of most of the great reforms of which he has since seen the fruition.<sup>(1)</sup> These reforms, however, as is well known, have not in all cases been freely or readily accepted, and to accomplish many of them has required constant labor. No wiser advice could have been given to the new President than that contained in the remark which George S. Hillard is said to have made to Mr. Eliot, on meeting him on the street soon after his election.<sup>(2)</sup> "Do you know what qualities you will need most out there at Harvard?"—President Eliot replied, he supposed he would need industry, courage and the like.—"No," said Mr. Hillard, "What you will need is patience—patience—patience."

The manner in which the new President assumed his office, and the impression made upon two famous Harvard graduates, is well illustrated in the following letters.

On December 10, 1869, James Russell Lowell wrote to Charles Eliot Norton<sup>(3)</sup>: "Our new President of the College is winning praise of everybody. I take the inmost satisfaction in him and think him just the best man that could have been chosen. We have a real Captain at last."

On April 3, 1870, Dr. Oliver Wendell Holmes wrote to John Lathrop Motley<sup>(4)</sup>:

Another sensation in a somewhat different sphere is our new Harvard College President. King Log has made room for King Stork. Mr. Eliot makes the Corporation meet *twice* a month instead of once. He comes to the meeting of every Faculty, ours among the rest, and keeps us up to eleven and twelve o'clock at night discussing new arrangements. He shows an extraordinary knowledge of all that relates to every department of the University, and presides with an aplomb, a quiet, imperturbable, serious good-humor, that it is impossible not to admire. We are, some of us, disposed to think him a little too much in a hurry with some of his innovations, and take care to let the Corporation

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(1) See full report of this address in *Harvard Graduates Magazine*, Vol. XII.

(2) *President Eliot as an Educational Reformer*, by President William DeWitt Hyde, in *Harvard Graduates Magazine*, Vol. VII.

(3) *Letters of James Russell Lowell*, Vol. II.

(4) *Life and Letters of Oliver Wendell Holmes*, by John T. Morse, Jr., Vol. II.

know it. I saw three of them the other day, and found that they were on their guard, as they all quoted that valuable precept, *festina lente*, as applicable in the premises. I cannot help being amused at some of the scenes we have in our Medical Faculty,—this cool, grave young man proposing in the calmest way to turn everything topsy-turvy; taking the reins into his hands and driving as if he were the first man that ever sat on the box. I say amused, because I do not really care much about most of the changes he proposes, and I look on a little as I would at a rather serious comedy.

"How is it, I should like to ask," said one of our number the other day, "that this Faculty has gone on for eighty years managing its own affairs and doing it well,—for the Medical School is the most flourishing department connected with the College,—how is it that we have been going on so well in the same orderly path for eighty years, and now, within *three or four months*, it is proposed to change all our modes of carrying on the School? It seems very extraordinary, and I should like to know how it happens."

"I can answer Dr. ———'s question very easily," said the bland, grave young man: "There is a new President."

The tranquil assurance of this answer had an effect such as I hardly ever knew produced by the most eloquent sentences I ever heard uttered. Eliot has a deep, almost melancholy-sounding voice, with a little of that character that people's voices have when there is somebody lying dead in the house, but a placid smile on his face that looks as if it might mean a deal of determination, perhaps of obstinacy. I have great hopes of his energy and devotion to his business, which he studies as I suppose no President ever did before; but I think the Corporation and Overseers will have to hold him in a little, or he will want to do too many things at once.

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Again, on December 22, 1871, Dr. Holmes wrote to Motley:

Our new President, Eliot, has turned the whole University over like a flapjack. . . . It is curious to see a young man like Eliot, with an organizing brain, a firm will, a grave, calm, dignified presence, taking the ribbons of our classical coach-and-six, feeling the horses' mouths, putting a check on this one's capers and touching that one with the lash,—turning up everywhere, in every Faculty (I belong to *three*), on every public occasion, at every dinner orné, and taking it all as naturally as if he had been born President.

Meanwhile the Law School began the fall of 1869 in a prosperous state, and quite unconscious of the impending revolution in its administration. On October 21, the Professors reported to the

Visiting Committee of the Overseers, that "the condition of the School at the present time is eminently satisfactory. } The whole number of students is 114 from 20 States and New Brunswick and Nova Scotia, of whom 40 are from Massachusetts." They reported also that at the beginning of the previous year, when Professor Holmes succeeded Professor Parker, five changes in the system of teaching had been made:

*First:* Topics or questions were given out upon which written opinions were given by students designated for that purpose. After these were read in the presence of the Faculty and the students oral discussion was held.

*Second:* All the Faculty are present at all the Moot Courts instead of each one in his turn as heretofore.

*Third:* Two prizes for essays by students in the junior classes were added to the four prizes heretofore offered.

*Fourth:* Written exercises in pleading are received from students in cases given for the purpose; and are afterwards commented upon by one of the Professors.

*Fifth:* The librarian takes an account of the attendance of each student at each lecture.

These changes were offered for the consideration of the Corporation and received their approval. After a year's experiment we can speak of them as eminently satisfactory and useful. We believe they are regarded by the students, as they certainly are by the Faculty as decided improvements. The attendance of the students, on the exercises, their interest in their studies and their improvement, so far as we can judge of it by any tests we can apply, leave nothing to be desired. The Professors do all they can to cultivate free and cordial personal intercourse with the students; and their efforts in this direction appear to be appreciated and reciprocated.

While, in the eyes of the Professors, the condition of the School appeared entirely satisfactory, there were many members of the Bar who felt that there ought to be a considerably higher standard of legal education, and who were dissatisfied with the system in vogue at the School. This feeling was now voiced by the Visiting Committee, which, through its Chairman, Francis E. Parker, made to the Board of Overseers in 1869, one of the briefest reports on record:

The condition and prospects of the Law School have been the subject of much discussion by the Committee, but they have found the subject too important and too difficult to mature and agree upon any recommendations for change which they can offer.

to the Overseers. They therefore make no further report, but say only in conclusion that in their opinion the whole subject should be carefully considered by a committee so constituted as fully to represent and command the respect of the legal profession as well as to have weight with the Corporation, the Overseers and the public.

One of the first results of this rather derogatory report was the tendering by Professor Parsons of his resignation as Dane Professor, December 11, 1869, to take effect March 1, 1870. (1) Parsons had served in his position for twenty-one years. "His teachings and writings have done much to maintain and build up the reputation of the Law School", so wrote the President. As senior member of the Law Faculty, he was the nominal Dean. He was now sixty-three years of age, and he felt that at his time of life, it was too late for him to remodel all his old views and to co-operate in the novel projects of reformation which the new President was already proposing. The news of Parson's resignation caused great sorrow and dismay amongst the students of the School, as well as among many of his old pupils. Nor were these feelings allayed when the news was spread abroad that on the very day when the Corporation accepted Parsons' resignation, January 6, 1870, it had proceeded to elect as his successor in the Dane Professorship, a young New York lawyer, whose name was hardly known in Harvard College or in Boston legal circles—Christopher Columbus Langdell.

Langdell had been a student in the Law School from 1851 to 1854. Leaving in December, 1854, he had been admitted to practice in New York, but he had soon retired from active court work. His constant study in the Library of the New York Law Institute attracted the attention of many of the leaders of the Bar and he was frequently employed by them on the preparation of briefs, opinions, and pleadings, and notably by Charles O'Connor, the

(1) Professor Parsons continued to live in Cambridge, retaining all his old popularity with his former pupils and being consulted by them on frequent occasions. His interest in his writings for the Swedenborgian faith, and in the various new editions of his law books which continued to have great sale absorbed most of his attention. He died on January 26, 1882. His principal publications were as follows—*Contracts* (1853); *Mercantile Law* (1856); *Memoirs of Theophilus Parsons* (1859); *Law of Business for Business Men* (1857); *Maritime Law* (1859); *Marine Insurance* (1868); *Promissory Notes and Bills of Exchange* (1862); *Partnership* (1867); *Shipping and Admiralty* (1869); *Political, Personal and Property Rights of a Citizen of the United States* (1875); *Infinite and Finite* (1872); *Deus Homo* (1867); *Outlines of the Religion and Philosophy of Swedenborg* (1875).

leading New York lawyer of the time, who termed Langdell, "the best read lawyer in New York."

In 1858, he appeared as counsel with Peleg W. Chandler in a Massachusetts case (*Kuhn v. Webster*, 12 Gray 3) involving the construction of a will, and won the case against the veteran Samuel E. Sewall and Professor Emory Washburn as opposing counsel. In the same year, he accepted the offer of a partnership with William Stanley; and in 1860, Judge Edwards Pierrepont (afterwards Attorney General of the United States and Minister to England) joined the firm. In 1864, the firm became Stanley, Langdell and Brown, the latter, Addison Brown, having been a fellow student in the Law School with Langdell, and later United States District Judge.

Langdell's work was, however, restricted almost exclusively to the office, and his devotion to study was so great that he established his bedroom in connection with his law office.

Such was the man to whom President Eliot, of his own motion and with no outside suggestion, turned to replace Professor Parsons. It is no wonder that the lawyers of Boston and the governing bodies of the University were struck dumb with amazement.

For the first time in the life of Harvard Law School, it was proposed to choose as Professor, a young man of no legal reputation (except among the few lawyers who had employed him), a man of no national fame, and a lawyer who had had substantially no court practice.

But President Eliot knew well what he was doing and what he proposed to do; and he has himself described the manner of his choice(1):

I remembered that when I was a Junior in College in the year 1851-1852, and used to go often in the early evening to the room of a friend who was in the Divinity School, I there heard a young man who was making notes to *Parsons on Contracts* talk about law. He was generally eating his supper at the time, standing up in front of the fire and eating with good appetite a bowl of brown bread and milk. I was a mere boy, only eighteen years old; but it was given to me to understand that I was listening to a man of genius.

In the year 1870, I recalled the remarkable character of that young man's expositions, sought him in New York, and induced

(1) Speech at the dinner of the Harvard Law School Association, Nov. 5, 1886.



him to become Dane Professor. So he became Professor Langdell. He then told me, in 1870, a great many of the things he has told you this afternoon: I have heard most of his speech before. He told me that law was a science: I was quite prepared to believe it. He told me that the way to study a science was to go to the original sources. I knew that was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original memoir of the discoverer of that fact or principle.

Himself a scientific man, it was natural that President Eliot should be attracted by one who undertook the task to which he was invited, with the conviction "that law is not only a science, but one of the greatest and noblest of sciences, there is and can be no dispute. That it is a science with which the most vital interests of the public and the State are closely bound up is equally beyond dispute. . . . A Law School which does not profess and endeavor to teach law as a science has no reason for existence." (1)

The theory on which President Eliot made the selection of the new Professor was well stated by Langdell himself, sixteen years later. (2)

I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before. What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes—not experience, in short, in using law, but experience in learning law; not the experience of the Roman advocate or of the Roman praetor, still less of the Roman procurator, but the experience of the jurisconsult.

President Eliot, in later years, stated his own theory as follows (3):

The teachers who administer this system must be men who possess large and systematic knowledge of law, sound judgment, enthusiasm, and the power of clear exposition; but they need not have been eminent at the bar or on the bench. It has but seldom

(1) See Annual Report of Dean Langdell for 1880-81.

(2) Speech of Dean Langdell at the dinner of the Harvard Law School Association, Nov. 5, 1886.

(3) President's Annual Report for 1881-82.

happened that the same man achieved eminence both in practice and as a teacher. In short, the teaching of law is a difficult and honorable profession in itself and cannot often be combined with, or late in life taken up in exchange for, the practice of law, another absorbing profession which appeals to different motives, develops different qualities, and holds out different rewards.

Such views as these were not readily accepted by the lawyers of the day; nor was Eliot's opinion that a lawyer had seldom attained eminence both in practice and as a teacher, considered accurate.

Furthermore, the great body of lawyers did not regard law as a science, in the sense in which Langdell used that term.

As President Eliot said, in 1891 (1): I remember to have heard a very eminent member of the Boston Bar say in the Board of Overseers once, 'The College stands for philosophy, for literature, for humanities, for the progress of mankind; as to the Law School, the Medical School, they are bread and butter.' "

Consequently considerable opposition to the choice of the Corporation developed in the Board of Overseers, but when it was found that prominent New York lawyers, like James C. Carter, heartily endorsed Langdell, his election was finally confirmed.

So modest a man was Langdell, however, that when asked by members of the governing Boards, who knew nothing about him, for the names of New York lawyers who might answer inquiries as to his qualifications, he declined to comply with their request; and he further refused to meet a number of the Overseers at dinner, being unwilling to appear to take any steps to influence his own election. (2)

Professor Langdell entered upon his duties at the beginning of the second term, February 21, 1870. As Professor Washburn was to be absent in Europe, his place was supplied by the appointment of several prominent practising lawyers to act as Lecturers; Otis P. Lord, Judge of the Massachusetts Supreme Court (who declined the appointment); John C. Gray, Jr., a graduate of the College in 1859, and a Law School student, 1860-62; Charles S. Bradley, the distinguished Chief Justice of Rhode Island, a Law School student of 1840-41; Edmund H. Bennett, a Law School

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(1) Speech at the dinner of the Harvard Law School Association, June 23, 1891.

(2) Professor James Barr Ames is authority for the above.

student of 1851, a noted law writer, and then Judge of the Probate Court for Bristol County. (1)

During this term, Professor Holmes lectured on Equity Pleading and Domestic Relations; Professor Langdell, on Negotiable Paper and Partnership; Judge Bradley, on Real Property; Judge Bennett, on Criminal Law, and Wills and Administrations; Mr. Gray, on Bankruptcy and Jurisprudence of the United States. The system of instruction continued much as in previous years. Fifteen Moot Courts were held by Professors Langdell, Holmes and Judge Bradley. Written opinions were delivered three times, once before Professor Holmes and twice before Professor Langdell. Four exercises in Pleading were given out by Professor Holmes during the term. Professor Langdell also gave out exercises in Pleading and forms relating to Negotiable Paper, in connection with his lectures on that subject. The number of students during the first term was one hundred and twenty-two; during the second term one hundred and sixteen.

While no change had been brought about in the system of instruction in the Law School during Eliot's first year as President, there were signs of the approach of a new régime. One of these may be told in the President's own words:

Formerly it was not the custom for the President of Harvard College to have anything to do with the Professional Schools. I remember the first time I went into Dane Hall after I was elected President. It was in the autumn of 1869, a few weeks after the term began. I knocked at a door which many of us remember, the first door on the right after going through the outside door of the Hall, and, entering, received the usual salutation of the ever genial Governor Washburn, "Oh, how are you? Take a chair,"—this without looking at me at all. When he saw who it was, he held up both his hands with his favorite gesture, and said, "I declare, I never before saw a President of Harvard College in this building!" Then and there I took a lesson under one of the kindest and most sympathetic of teachers. (2)

(1) Lord and Gray were appointed Dec. 24, 1869; Bradley, Jan. 14, 1870; Bennett, Jan. 28, 1870. By vote of the Corporation, Aug. 20, 1870, they received as compensation: Bradley, \$810; Bennett, \$540; Gray, \$540.

(2) Professor Washburn's statement was not absolutely accurate; for in the *Harvard College Archives* is to be found a note from Washburn to President Felton, written in January, 1861, showing that a visit to the Law School was at least contemplated by the President.  
"Dear Pres.

You intimated a wish to be present at my closing lecture. Of course I should be honored and gratified by such a presence. But there is no arrangement for either of the other Professors to be present. Still if

The first warning of the impending revolution appeared in the Circular of the School issued for the second term of the academic year 1869-70, which contained the following sentence: "The Faculty reserve the right of basing their recommendations for a degree upon a final examination."

This announcement was made after the adoption by the Corporation April 8, 1870, of a new revision of the Statutes and Laws of the University, which included the following statute:

12. The ordinary degrees of Bachelor of Arts, Master of Arts, Bachelor of Science, Bachelor of Divinity, Bachelor of Laws, Doctor of Medicine and Doctor of Dental Medicine, are conferred after recommendation by the several faculties, by vote of the Corporation with the concurrence of the Overseers. It is required that no candidate for these degrees be recommended except after thorough public examination.

To this was added a proviso that this statute was not to affect the Law School degrees before Commencement of 1871.

Although these statutes were not agreed to by the Overseers until some time later, the announcement in the Law School Circular of a possible requirement of an examination for a degree of LL. B., came upon the public as an innovation of a most startling character.<sup>(1)</sup>

Hitherto, as has been already pointed out, the degree was conferred on students who had attended the School a certain number of terms. It was frequently conferred after the student had severed his connection with the School. In its character it had been little more than a "certificate of residence, with such promise of legal attainments as the responsiveness of the individual to the enthusiasm of his instructors might afford."<sup>(2)</sup>

you are entirely at liberty to be bored for half an hour and will call at my rooms say five minutes after twelve to-day, I shall be most happy to attend you into the Hall and do what I can to bore you. And should be glad to have you show yourself there as the head of the Law Faculty, that the School may go away with sentiments of more profound respect for that August Body than either of its members or lower extremities are able to inspire."

See *Harv. Coll. Papers*, 2nd Series, Vol. XXVIII.

(1) The first Law School to require examination for a degree appears to have been the St Louis Law School, founded in 1867. See *Green Bag*, Vol. I (1889).

(2) President Eliot's *Inaugural Address*.

See also *President Eliot's Administration*; by Charles F. Dunbar, *Harv. Grad. Mag.*, Vol. II.

At the opening of the year 1870-71, the Circular of the School disclosed the full extent of the astonishing changes proposed—both in the course and method of instruction and in the requirement for degrees.

A system of prescribed and elective studies was initiated; and the degree of LL. B. was to be conferred only on students who had passed the required examinations. The Circular stated that:

(1) the course of study would thereafter comprise the subjects therein enumerated.

(2) that seven of those subjects, being such as were deemed fundamental and elementary, would be required, and that the remainder would be elective;

(3) that all the required studies, and as many as practicable of the elective studies, would be taught every year, but that no student would be expected to pursue in any one year all the subjects taught in the School in that year.

The course was as follows—*Required Studies*: Real Property, Personal Property, Contracts, Torts, Criminal Law and Criminal Procedure, Civil Procedure at Common Law, Evidence; *Elective Studies*: (Commercial Law) Sales of Personal Property, Bailments, Agency Negotiable Paper, Partnership, Shipping including Jurisdiction and Procedure in Admiralty, Insurance; (Equity, Real Property and Kindred Subjects) Real Property Evidence, Jurisdiction and Procedure in Equity, Principal and Surety, including Guaranty, Domestic Relations, Marriage and Divorce, Wills and Administration, Corporations, Conflict of Laws, Constitutional Law, Debtor and Creditor, including Bankruptcy.

The degree of LL. B. will be conferred upon students who shall pass satisfactory examinations in all the required subjects and in at least seven of the elective subjects, after having been in the School not less than one year. The intention is, that the seven required subjects should occupy the student fully during one year; the seven electives are meant to fill a second year. The required studies are designed to serve as an introduction to the electives. Equivalents will be accepted from students who offer themselves for examination upon subjects which they have studied elsewhere. Students who are not candidates for a degree can avail themselves of the advantages of the School to whatever extent they see fit. . . .

The examinations for a degree will be of a thorough and searching character; but will be limited in scope to the ground covered by the instruction given in the School in the several subjects.

While this great change did not meet with universal approbation, the general feeling among lawyers was that it was a wise move. (1)

The Visiting Committee reported at the same time to the Overseers, through Francis E. Parker, Chairman:

That in the discharge of their duty, they have, by committees of their number, visited the School and attended its exercises. They have also, in their own meetings, and in conference with the President of the University, considered and discussed the prospects and needs of the School and the various plans suggested for increasing its usefulness. Several of the suggestions which they had intended to make have been anticipated by the action of the Law Faculty and of the Corporation, especially that of procuring courses of lectures and instruction by gentlemen eminent in the active practice of the profession, from which the committee expect excellent results.

They are happy in being able to report generally that the School is animated with an excellent spirit, and that both what it is now doing, and what it promises for the next years, is encouraging and satisfactory.

The committee also wish to express the opinion that the system of oral recitations, formerly in use, might with advantage be restored. It has seemed to them that a system of lectures, not assisted and enforced by recitations, is defective in theory, and not satisfactory in practice. The committee are happy to observe that systematic instruction in pleading, with written exercises, has been introduced, and they think that similar instruction, to some extent, in drawing other legal papers, might be of practical advantage.

This and other criticisms elicited from ex-Professor Joel

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(1) The *American Law Review*, Vol. V, Oct., 1870, said:

"For a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts. We say 'almost a disgrace,' because, undoubtedly, some of its courses of lectures have been good, and no law school of which this can be said is hopelessly bad. Still, a school which undertook to confer degrees without any preliminary examination whatever, was doing something every year to injure the profession throughout the country, and to discourage real students. So long as the possession of a degree signified nothing except a residence for a certain period in Cambridge or Boston, it was without value. The lapse of time insured its acquisition. Just as a certain number of dinners entitled a man in England to a call to the bar, so a certain number of months in Cambridge entitled him to a degree of Bachelor of Laws. So long as this state of things continued it was evident that the School was not properly performing its function. We are glad to learn, therefore, that the old system has been abandoned, and are glad to find convincing evidence of the fact in a circular just issued by the Faculty."

Parker the vigorous, sarcastic, and spicy written answer, previously referred to (1), an elaborate pamphlet giving the history of the School and warmly defending the previous administration of its affairs.

As to the method of instruction advocated by the Committee he said:

The mode of instruction adopted by the Litchfield School was well adapted to the time when it was instituted and attained its greatest success. But the multiplication of text-books and digests, in the half-century which succeeded, had rendered it inappropriate. It was no longer the business of students to make manuscript texts and digests for themselves. The multiplication of decisions rendered it impracticable to collect and explain all, or even the most important of them, and an attempt to follow that course would have been not merely unwise, but positively pernicious. While it answered well in the age when cases were comparatively few, when Mansfield and Ashhurst, Buller and Grose had just been settling in a court of law some of the great principles which lie at the foundation of commercial jurisprudence, and those principles had not been traced into their minute ramifications,—it would now, in my opinion, with the immense addition of cases and arguments which the books furnish, fill the mind of the student with a mass of material which he may readily find elsewhere when he has occasion for it,—which, if he were to attempt to memorize it in the School,—however he might classify it,—he could never readily apply to the infinite variety of human transactions in the minute variations which might present themselves in his practice; and if he did not become merely a “case lawyer”, as those are called who have only a recollection of cases, he would be, at best, a digest of matter which he could not apply with the

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(1) *The Law School of Harvard College*, by Joel Parker (1871).

As to this pamphlet, the *New York Nation* said, March 16, 1871, Vol. XII:

“Judge Parker is a man widely known in the profession and in the country at large, as well as among his old pupils, not only for his legal abilities and attainments, but also for his sincere enjoyment of a good fight. . . . The truth of the matter would seem to be that each party to this dispute . . . has on his side some right, that each has plenty of good intentions, and that each may be well enough content to let the matter rest as it is. . . . The Harvard Law School has, ever since its foundation, done excellent work, highly creditable to its teachers and scholars, that it has been so far from being a disgrace to Massachusetts as to have been an honor to the State and of service to the profession throughout the whole country, that its degrees, if they were given without examination, were nevertheless carried away by men who had, on the whole, studied well. . . . On the other hand, it is true too that the School can do something and will, it is highly probable, do something under the changed system, not only to increase its efficiency, but to help on the cause of sound education in the United States.”

necessary facility. No small part of the education of the legal student is to learn how to study,—to learn that the law, as a whole, is, necessarily, a mass of principles and rules applicable to various interests, rights, obligations, and duties, many of which relate to a single branch of those interests or rights,—as the principles which govern the acquisition, possession, and transfer of real estate, the law which regulates the rights and duties of Principal and Agent, and the law of Bills of Exchange; while other principles and rules have a much wider application; that in relation to these last, it is often a most difficult inquiry to ascertain which of different principles governs a particular case; and that there are, besides, distinctions continually presenting themselves requiring a very nice and accurate discrimination.

But I am not writing a treatise on the study of the law, my object being, merely, to justify, if I may, that course of instruction which leads the student to the acquisition of a knowledge of the great principles which lie at the foundation of jurisprudence,—to an investigation of the relations of the different principles to each other,—and to their practical application,—instead of a course which leads to the collection of a large number of legal propositions, and to a digest of cases. . . .

Recitations, however well adapted to the education of children, and even to young men in the Academic department, and however perfect they may be, will not make lawyers. That they may be used to some extent is not to be doubted,—but they should be auxiliary, and not principal.

Neither will lecturers make lawyers. But it is more important that the Instructor should tell the students of a Law School what he knows which is not contained in the text-books, than that they should tell him what they know is to be found there. . . .

To an attack on the School's past administration and to an indorsement by the *American Law Review* of the institution of examinations for the degree, he replied:

With the exception of the requisition of a certain term of study, the degree is honorary, and has been so understood by those conversant with the rule. It did not admit to the Bar, unless there was in some State, legislation to that effect, and in such case the fair presumption was that the act was passed with knowledge of the requirements of the School, and with a design to induce candidates for the profession to avail themselves of advantages for the acquisition of legal knowledge, greater than they would have by the general course of admission.

Generally, however, where provisions exist by which the degree operates as an admission to the Bar, they are limited to the school or schools of the State, and intended for the encouragement of such schools, and in such cases as there is no examination for ad-



mission to the Bar, it is quite proper that one should precede the degree.

But in the absence of legislation giving to the degree the effect of admission, the degrees of a law school differ materially from the ordinary degrees of the Academic department. There the study for a term of years is not for the purpose of qualifying the student for a particular vocation, to enter which he must pass a subsequent examination, on his college studies, by another authority. Whereas that is emphatically true of the student in the Law School, if he is required to pass an examination for his degree, and another for his admission to the Bar,—one for the honor, another for the practical result. He may like it. If so, there can be no reasonable objection.

The tendency of legislation for many years past has been to give admission to the Bar to all citizens of the State, twenty-one years of age, and of good moral character. Such is, by statute, the rule in some of the States, compulsory on the courts. No novitiate, whatever, is required.

With such legislation, and such tendencies, if it is not the duty of the law schools to throw open wide their doors, and entice all who can be induced to come in and avail themselves of their advantages,—offering the honors of the school, on time, without further examination respecting acquisitions, it is certainly not an offence, to do so. Great benefit must result. A young man cannot well breathe the atmosphere of an active school without learning something of the law. As a general rule, parties induced to join in order to obtain the degree, whether with or without examination, will understand their own interest, and labor accordingly. Idleness and negligence will be the exception. Examination as a requisite for the degree must have a tendency to repel those whose previous limited education renders them doubtful whether they shall be able to acquit themselves satisfactorily, under such a test; and these are the very ones it is desirable to reach. Some of them,—I think I may say the greater portion of the earnest ones,—are quite as likely to avail themselves fully of the advantages which they possess, to use what they acquire, in the further pursuit of professional knowledge, and in the successful practice of the profession, as those who are anxious to be examined to obtain the diploma. There were from time to time ten, twelve, fourteen attorneys at law, in the School, desirous to obtain the degree. How many of them would have come to be examined for it cannot be known. . . .

For these and other reasons, I have been satisfied of the wisdom of the learned men whose policy invited as many as would, to come and share the advantages of the School,—to acquire the knowledge how study should be pursued, and investigations made, and principles applied; and how distinctions show differences leading to varied results,—rather than to memorize an indefinite number of legal principles, which dozens of text-books at the

present day will furnish them, and which therefore they can commit to memory more thoroughly in the early days of their professional life. A young man may make himself a very respectable digest of legal propositions with a very limited knowledge of the reasons why they exist, and of the methods of their use.

The knowledge of forms, and of their practical application, is best acquired in an office.

Thus much for the libel in the *Law Review*.

The year 1870-71 opened with 154 students, an increase of 34 over the number at the beginning of 1869-70. During the year 165 students were in the School, of whom 102 remained through the year, the average for the year being 136.

The experiment of appointing Lecturers "who are engaged in the active practice of the profession", was continued; Edmund H. Bennett, Charles S. Bradley, and Nicholas St. John Green were chosen by the Corporation. Mr. Green, the new Lecturer, was a graduate of the College in 1851, of the Law School in 1853, and was then practising law in Boston, with considerable experience in criminal law.<sup>(1)</sup>

On September 27, 1870, the arrival of the new régime was further marked by the first recorded formal meeting of the Law School Faculty. At this meeting, held in the President's office, there were present:

President Eliot (in the chair) and Professors Washburn, Holmes and Langdell. The records, in Langdell's handwriting, show that but two matters of business were transacted. The first was of supreme importance,—the election of Langdell as Dean.

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(1) The *American Law Review*, in the article previously quoted, said of these Lecturers and of the Professors:

"The learning and ability of these gentlemen warrant us in predicting that their labors will make the H. L. S. what it ought to be. What it ought to be we find well expressed in a late report of Dr. E. O. Haven to the trustees of the North Western University. "The object of a law department is not precisely and only to educate young men to be practising lawyers, though it will be largely used for that purpose. It is to furnish all students who desire it, the same facilities to investigate the science of human law theoretically, historically and thoroughly as they have to investigate mathematics, natural science or any other branch of thought.

In these words the *Review* set forth almost exactly the ideal which Eliot and Langdell had in their minds.

Bennett and Bradley were appointed June 10, 1870, and Green, April 29, 1870, to serve during the academic year, 1870-71.

The salaries of the Professors and Lecturers were fixed by vote of the Corporation, Nov. 25, 1870, as follows:

Professors Washburn and Holmes, \$4,000 each; Professor Langdell, \$3,800, with the use of rooms over the Steward's office; Judge Bradley, \$1,500; Judge Bennett, \$500; Mr. Green, \$1,000.

This move had been in President Eliot's mind from the beginning—ever since the election of Langdell as Dane Professor. It came, however, as a shock of surprise to those interested in the School, to the students and Professors, that a comparatively young man of forty-three years, of slight practise at the Bar and of only six months experience in teaching, should be made Dean over the heads of his older and more distinguished associates. (1)

The second action of the Faculty as recorded by Langdell was as follows:

"At the suggestion of the President, the Faculty then proceeded to consider the subject of a Tabular View for the first half of the academic year."

Previously, and for many years, the course of study had extended through two years, but it was only taught once during that time, i. e. one half of the course was taught one year, and the other half the next year. Hence the School was not divided into classes for purposes of instruction, but the same instruction was given to all; and although a student entering the School at any time, and remaining two years, would go through the whole course, yet the order in which he would do it depended entirely upon the time of his entering. This, however, was subject to one modification, namely: it being considered necessary for the student to begin his studies by reading *Blackstone's Commentaries* and *Kent's Commentaries*, or one of them, lectures were delivered

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(1) This election of a Dean was another result of the new Statutes under which all the Professional Schools of the University were made organized departments of the University much more formally than under the previous Statutes and Laws of 1848.

Under the new Statutes a regular Dean was to be head of the Law Faculty, instead of the Senior Professor as hitherto. This was brought about by Statutes 6 and 7 and 15, as follows:

6. "Each College and School of the University is under the direction of a Faculty, the members of which are designated by the Corporation. Each Faculty has the general control of the studies and discipline of its College or School and of the conditions of admission thereto; it has authority to make all orders and regulations necessary to the exercise of this control subject to the revision of the Corporation; and it is expected to propose to the Corporation any changes in the Statutes which it may deem desirable.

7. The Faculty of each Professional School elects a Dean, whose duty it is to keep the Records of the Faculty, to prepare its business and to preside at its meetings in the absence of the President.

15. The Faculties have authority to impose fines for damages done to property; to inflict at their discretion the penalties of admonition, suspension and expulsion; and to use all other appropriate means of discipline; provided that no student be separated from the University either temporarily or permanently by a vote of less than two-thirds of the members of his Faculty present and voting. . . .

each term on one of those works, for the benefit of such students as had just entered the School without previous study.

Although the method of instruction was stated in the Catalogue for 1870-71 in much the same terms as in the Catalogues for the previous forty years:

Instruction will be given in recitations; by lectures and exposition; by moot courts, by cases assigned to students for written and oral opinions and by exercises in drawing pleading at common law and in equity.

there was, however, one short sentence in both the Circular and the new Catalogue which contained the seed of the great revolution about to occur in the mode of teaching law:

Each instructor will adopt such mode of teaching the subjects of which he has charge as in his judgment will best advance the pupil in his course.

In these few modest words was first heralded the birth of the Langdell Case System.

At the very opening of the fall term, a rumor had spread abroad that the new Professor had an entirely new plan of teaching. It was known that, during the previous spring, he had been collecting cases for some kind of a book, and that the advance sheets were to be ready for his first lecture. Hence there was considerable curiosity excited, and practically the whole School attended Langdell's first lecture.

The scene is thus graphically pictured by Samuel F. Batchelder (L. S. 1895-98) in his sketch of Langdell (1):

The day came for its first trial. The class gathered in the old amphitheatre of Dane Hall—the one lecture room of the School—and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes! The lecturer opened his.

"Mr. Fox, will you state the facts in the case of *Payne v. Cave*?"

Mr. Fox did his best with the facts of the case.

"Mr. Rawle, will you give the plaintiff's argument?"

Mr. Rawle gave what he could of the plaintiff's argument.

"Mr. Adams, do you agree with that?"

And the case-system of teaching law had begun. . . .

Consider the man's courage. . . .

Langdell was experimenting in darkness absolute save for his

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(1) See *Green Bag*, Vol. XVIII, (1906).

own mental illumination. He had no prestige, no assistants, no precedents, the slenderest of apparatus, and for the most part an unpromising *corpus vile*. He was the David facing a complacent Goliath of unshaken legal tradition, reinforced by social and literary prejudice. His attempts were met with the open hostility, if not of the other instructors, certainly of the bulk of the students. His first lectures were followed by impromptu indignation meetings.—“What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: What’s the law?”

Did the new lecturer himself know the law? He apparently took back in one lecture what he had said in the last. Young Warner, a keen logician (and one of the first converts to the new system) cornered him squarely one day, amidst a hurricane of derisive clapping and stamping. Would it be believed, “the old crank” went back to the same point next day and worked it out all over again! Most of the classes could see nothing in his system but mental confusion and social humiliation. They began to drop away fast.

That the new system of teaching was at first unpopular, there can be no question. Before the end of the first term, Langdell’s class had greatly dwindled, and, in fact, it is said that for some time it was reduced to seven devoted men, (of whom, James Barr Ames (L. S. 1870-73) was one) who went by the name of “Kit’s Freshmen” or “Langdell’s Freshmen.”

These men, however, discerned that there was something here better than text book and lectures, and stuck to the ship.

They were finding out how the law was made, and the reasons for it, and how it was applied in actual practice. The lecturer was working it out for himself with them. Every step of the reasoning was scrutinized and tested and re-examined till proved right or wrong. The law was being taught as a science, not as a rag bag of rules and exceptions. In the happy phrase of Professor Gray, the language of the law was being taught, not from the artificial grammar, but from the natural translation. The rest of the class were apparently hoping for a quick arrival of the millennium, when “the law,” being fully “known,” there would be no need of cases in the courts to decide it. . . . The old professors called wholly for definitions and rules:—“When and by what statute were lands made alienable in England after the conquest?” “What is the difference between an action of trespass and an action of trespass upon the case?” The new Dean presented actual problems for solution:—“If A contract with B to serve him one year at so much per month, and at the end of six month’s service he dies, will his representatives be entitled to recover against B for the six month’s service; and if so, how

much and upon what principle?"—"If a debtor tender to his creditor the amount of the debt on the day it becomes due, and the creditor refuse to receive it, and afterwards sue the debtor, how should the latter defend himself?"

Dismay filled the School. What chance now of learning what the law was?(1)

Dean Langdell himself has thus set forth the principles on which his system was based(2):

First, that law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can be learned and taught in a university by means of printed books. If, therefore, there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means,—for instance, the work of a lawyer's office, or attendance upon the proceedings of courts of justice,—it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him,—then a university, and a university alone, can furnish every possible facility for teaching and learning law.

Of the design and scope of his revolutionary case book, which was published in October, 1871, under the title of *A Selection of Cases on the Law of Contracts, with a Summary of the Topics covered by the Cases* no better description can be given than that contained in its preface, and Langdell's own words should be read in full.

No other of the Professors was yet convinced that any departure from the old methods of instruction was necessary or desirable; and they continued to use the text books.

(1) *Green Bag*, Vol. XVIII.

(2) See Speech of Prof. Langdell, at the Meeting of the Harvard Law School Association, on Law School Day of the Commemoration of the 250th anniversary of the Founding of Harvard College, November 5, 1886.

For full account of the Case System, see Chapter XLIII infra.

The courses given during the year 1870-71 were as follows:

Professor Washburn lectured twice a week on Real Property, giving a required course for beginners, and an elective course for more advanced students; and he lectured twice a week during the year upon each course; on Wills and Administrations he lectured once a week during the last half of the year. Professor Holmes lectured twice a week for half the year on Jurisdiction and Procedure in Equity, Agency, Corporations, and twice a week for the latter half of the year on Bailments and Conflict of Laws. Professor Langdell's courses were on Contracts, Sales of Personal Property, and Civil Procedure at Common Law; and were thus described by him in his report as Dean:

In each of the two former subjects he used as a text-book a selection of cases which he had prepared for the purpose. Upon these cases he had three exercises a week during the year, consisting of lecture and recitation combined. It was an important incidental object of these exercises to teach Procedure, so far as it was involved in the cases which were the subject of the exercises. At the beginning of the year it had not been decided in what manner Procedure should be taught, except as stated above; but immediately after the Christmas recess the practice was begun of giving out cases in Pleading, each case containing a statement of facts, and four counsel being assigned, two on a side, to plead against each other on those facts until they came to an issue of law or fact, when the case would be ready for a hearing and decision. For the purpose of hearing and deciding such cases as were ready, Professor Langdell held a court each Friday afternoon, at three o'clock. This practice was continued through the year. No account was kept of the number of cases given out, but the practice was to give out a case to any four students who applied for one, or if they chose they could get up a case for themselves. The number of cases heard at each sitting varied from one to three and four. A week seldom passed without something being ready.

Judge Bradley lectured once a week on Evidence, giving a required course for beginners, and an elective course for more advanced students. Judge Bennett lectured on Criminal Law and Criminal Procedure, once a week. Mr. Green's lectures were on Torts, twice a week. Moot Courts were held once a week during the year, each of the three Professors sitting in turn. During the year, five cases were given out for written opinions, two each by Professors Washburn and Holmes, and one by Professor Langdell. Professor Holmes gave out two cases in Equity Pleading,

the whole School, or as many as chose, drawing a bill, answer, or other pleading, as the case might be, upon the facts given out, and handing it in to the Professor.

It is interesting to note that instruction in the Law of Torts was given for the first time, as a separate branch of law, and also that it was regarded as a radical move. "We are inclined to think that Torts is not a proper subject for a law book," said the *American Law Review* (Vol. V):

Under this title we expect to find some or all of the wrongs remedied by the action of trespass, trespass on the case and trover. But we cannot help believing that the cohesion or legal relationship, say of trespass quare clausum, is closer with the duties to him in possession enforced by real actions than with assault and battery. So, to give another example, the law of action for deceit seems to us to be properly presented in connection with that of estoppels in pais, as two forms of sanction for the same duty—not to defraud one's neighbors to put it broadly. Seduction, which we find in the next chapter of this book, belongs at the other end of the *corpus juris*.

We long for the day when we may see these subjects treated by a writer capable of dealing with them philosophically and self-sacrificing enough to write a treatise as if it were an integral part of a commentary on the entire body of the law. Such a result might be anticipated, if the able lecturer, for whose use the abridgment, was prepared, and who is achieving so deserved a success at Cambridge, should apply his subtle and patient intellect to the task.

One other change to be noted during Langdell's first year was the abolition of prize essays and the establishment of scholarships for the first time in the School, under the following vote of the Corporation, October 28, 1870:

On recommendation of the Law Faculty(1)

*Voted* to discontinue the offering of prizes for dissertations in the Law School.

*Voted* to establish in the Law School four University scholarships of the annual value of \$100, upon conditions hereafter to be determined.

(1) See vote of Law Faculty Oct. 24, 1870.

On Nov. 8, 1875, the Corporation increased the value of the Bussey Scholarships to \$150 each, and passed the following vote, Dec. 13:

"Whereas, no formal vote has ever been passed establishing Bussey Scholarship in the Law School, Bussey Scholars have been appointed for several years. *Voted*, that there be established in the Law School four scholarships to be called Bussey Scholarships, each with an annual income equal to the regular tuition fee of the School."



Toward the end of the spring term, the law students began to prepare for the new and dreaded ordeal of examinations. By vote of the Law Faculty June 7, 1871 "every student must designate seven elective subjects and only seven, on which he will be examined." The first written examinations from printed examination papers ever held in the School occurred June 14-22, 1871, in Harvard Hall, Massachusetts Hall and Dane Hall. The Report of the Visiting Committee in October, 1871, thus stated the method of examination :

Printed questions were submitted in June to the candidates, covering all the principal topics of Law and Equity. These questions they were required to answer in writing; the answers being written in the presence of some member of the faculty, without consultation with other persons or with books.

The examinations occupied six days, and judging by the questions and by such of the written answers as have been inspected by the committee, it was an honest and thorough test of the acquirements of the student. . . . The Committee consider the system a substantial advance in legal education.

In conclusion the Committee repeat the expression of their satisfaction at the general conditions of the School. There is evidence of industry, animation and progress which cannot but show itself in the future career of the students and in the reputation of this Department of the University. They have found the general condition of the School very satisfactory, showing evidence of activity and interest both on the part of the Professors and of the students. The experiment of introducing as Lecturers gentlemen in the active practice of the profession has been tried on a somewhat extended scale and no doubts are now expressed of its success. Instruction in pleading has been intro-

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A change in the method of assigning scholarships was voted by the Corporation April 19, 1886:

*"Voted*, on recommendation of the Faculty of the Law School, to alter the existing practice as to assignment of scholarship in the Law School by the adoption of the following rule:

A limited number of scholarships of the annual value of \$150 each will be hereafter awarded to meritorious students standing in need of such assistance, who have been in the School one full year at least, and who intend to remain in the School another full year at least. The award will be made by the Corporation at the recommendation of the Faculty at the beginning of each academic year. One third of the annual value of the scholarship is paid on the 10th of October following the award, one third on the 12th of January and one-third on the 12th of April.

Application for the scholarships must be made in writing to the Dean by the first of June. In making the award a preference will be given to members of the third year class; and no scholarship will be granted to a member of the second year class unless he intends to remain in the School until he completes his course."

duced in a new form by exercises in the nature of Moot Courts in which students have shown great interest.

The number of candidates examined was 35, of whom all were rejected. The number of students recommended for the degree of LL.B. at the end of the year was 77, of whom 53 had complied with the requisitions of the old system, and 24 with those of the new.

## CHAPTER XLII.

### THE TRIAL PERIOD 1871-1881.

At the end of the academic year, 1870-71, the Faculty, acting largely on Professor Langdell's initiative, took the next step in revolutionizing American legal education.

Firm in his belief that law was a science, to be taught as such and to be learned as such, Langdell was equally convinced that no student could receive a proper legal education in so short a period as eighteen months. The successful administration of Langdell's own method of teaching certainly required a longer period. The year's experience had proved to the Law Faculty also that the existing regulations were defective in the following particulars: 1. that they tempted students to try the experiment of doing two year's work in one; 2. that the course of study which should be required of every student, as fundamental, was too extensive to be gone through within one year, and ought to occupy not less than two years, and hence, that a course of study extending through only two years was not compatible with an elective system; 3. that an elective system required a larger force of instructors than the School could then command.

With a view to remedying these evils, the Circular for 1871-72 announced; first, that the prescribed course of study would extend through two years; second, that it would comprise only such branches of law as were deemed fundamental, and also of sufficient importance to require separate and systematic study and instruction, namely: 1. Real Property. 2. Contracts. 3. Torts. 4. Criminal Law, and Criminal Precedure. 5. Civil Procedure at Common Law. 6. Evidence. 7. Jurisdiction and Procedure in Equity; third, that the entire course would be taught every year, so that students entering the School at the beginning of any year could begin the course and complete it in two years; fourth, that during the year 1871-72 seven specified subjects would be taught in addition to the prescribed course—Constitutional Law, Sales of Personal Property, Bailments, Marine Insurance, Corporations, Shipping and Admiralty, and Conflict of Laws.

The scheme was put into effect under a vote of the Law

Faculty, passed on motion of Professor Washburn, at its third meeting, March 28, 1871 :

Resolved, that a course of study be adopted to extend over two years and embrace only fundamental subjects, all to be prescribed, and to constitute the subjects of examination for a degree.

In accordance with this vote a course of study for the next year 1871-72 was drawn up and submitted to the Corporation. It was referred to the President and George T. Bigelow, April 14, 1871, and their report upon the conditions proposed for the degree of LL. B. was adopted by the Corporation, April 28 :

The degree of Bachelor of Laws will be conferred upon students, who, having been in the School during the whole course of two years, shall have passed satisfactory examinations at the end of each year in the prescribed studies of that year; and also upon those who, having been admitted one year in advance, shall have been in the School one year, and have passed a satisfactory examination in the prescribed studies of the second year, at the end of the year. At the beginning of the academic year 1871-72, students will be admitted to advanced standing upon satisfactory evidence in writing that they have diligently devoted at least one full year to legal study, exclusive of any other occupation. After the academic year 1871-72, such admission to advanced standing will be allowed only upon an examination which will be held at the beginning of the academic year and will require of the candidate a thorough knowledge of the following books: *Washburn on Real Property*; *Langdell's Select Cases on Contracts Vol I*; *Addison on Torts*, Abridged; *Blackstone's Commentaries*, Book 4; *Stephens on Pleading*, including the introduction.

Of the change in the plan of instruction, President Eliot said, in his Annual Report for 1870-71 :

Instruction is now given every year in all the prescribed studies of the two years' course, just as in the College the course of each of the four years is taught every year. This is a change greatly for the better. It is now possible for a student entering at the beginning of any year to pursue his studies in a natural order, adopted with a single view to the student's best progress. The increase of the teaching force, by the employment of Lecturers who are engaged in the actual practice of the profession, has made this improvement possible. The former system was only justified by poverty and the convenient though unsound theory that there is neither beginning nor end to the Law, neither fundamental principle nor natural development.

A Law School which tries to do thorough work in this country has to contend with two traditions which still have an extraordinary force. The notion prevails that the way to learn Law is to go into a lawyer's office, see the outside of his business, copy papers for him, and read his books in the intervals of other employments.<sup>(1)</sup> . . .

A young man should go into a lawyer's office after, and not before, he has been through a Law School, and even then not in the attitude of a student, but as an assistant or junior partner.

The second tradition with which Law Schools have to contend finds expression in the phrase "reading Law." The idea conveyed by this phrase is that Law is to be learned by reading treatises and reports, the implication being that guidance and systematic instruction are superfluous. Now it would be hard to mention any subject in which the precept and example of a good teacher and thorough scholar can be of so much service to the student as in Law. Law is emphatically a science, with a method and a history; it has a language of its own, and a voluminous literature. The student needs direction as to the order of his studies; he needs, from day to day, guidance in selecting the raw material on which to expend his labor; he needs to be supplied with general criteria for discriminating between truth and error, between things essential and things adventitious; he needs to be shown how to disentangle principles from masses of encumbering detail; he needs to have the legal mode of thinking and reasoning exem-

(1) President Eliot continued:

"This notion comes to us from the attorney's office in England. It never ought to have had much force in this country, where there is no distinct class of attorneys, particularly when it is question of how to train advocates or counsel, not attorneys. The business of an English attorney may doubtless be learned by much practice under supervision, just as any sort of trade or empirical business may be. English barristers have never been trained in attorney's offices. The English barrister who makes a specialty of conveyancing or of drawing pleadings for attorneys not unfrequently keeps a small Law School, and makes a considerable part of his income by teaching students to draw pleadings for a fee of one hundred pounds a year from each student. In England itself this private method of training young men to the Law is obsolescent. In this country, the more successful a lawyer is, the less he is inclined to spend time and thought in training inexperienced students. To teach is not considered a part of his professional business. The mere beginner can get little help from the lawyer into whose office he goes, unless the lawyer is a young man or an unsuccessful man who has abundant leisure, and even then the chances are that the amateur teacher will be inferior to the professional teachers in a Law School. A busy lawyer cannot be of much service to a student unless the student is capable of serving him. When a young man has thoroughly mastered at a good school the principles and methods of the Law,—when he has become familiar with law books and has learned how to investigate and prepare a case, how to find precedents and how to use them,—he is ready to be of some service in a lawyer's office; he can do work of a higher grade than that of a copyist, and the more he can be trusted to go alone the more serviceable he will be, the more he will profit by his experience as a subordinate, and the shorter that experience will be."

plified for him, and to be exercised in it himself; he needs to be trained to seize and insist upon the material points of a case, and to use brevity, pertinency, and consecutiveness in speech. The positive instruction to be received from a superior mind well versed in the whole matter is of as much value to the student of Law as of any other science or liberal art. Moreover, the student requires to be personally drilled by reciting, writing opinions, drawing pleadings, and arguing cases. "Reading Law" is therefore an absurdly inadequate description of legal study wisely conducted.

The opening of the year 1871-72 was a period of great doubt among those interested in the Law School.

In the first place, there was much criticism and even bitter opposition among lawyers, as well as among the Law School Professors and University officials, over the new Case System employed by Professor Langdell. Undoubtedly this kept many students from entering the School. In the second place, the examinations scared away many to whom they loomed as an insurmountable obstacle. The lengthening of the course also had its effect. The increase in the tuition fee, now put in force, was another factor.<sup>(1)</sup>

Owing to all these causes, the number of students in the School during the year was 138, of whom 107 remained during the whole year, the average being 121½.

One greatly needed improvement in the Law School Building

(1) In 1817, the tuition fee for Law School students had been fixed at \$100, that being the established fee at that time paid by students in lawyer's offices in Massachusetts. In that year, the college undergraduate paid a tuition fee of \$46 for the first two years, and \$64 in the last two years. From that date, however, the Law School fee remained at \$100, while the College fee nearly trebled, being \$150 in 1870. Another anomaly in the Law School was, that a student who remained in the School only a quarter or less fraction of a year was charged for only one quarter of a year, while in the undergraduate department a half year's tuition fee was charged for a half or any less fraction of a year. In 1870-71, steps were therefore taken towards bringing the fees in the Law School to a level with those of the College proper, it being announced in the Circular for that year, and voted by the Corporation April 28, 1871, that the charge for tuition thereafter would be one hundred and fifty dollars for the first year, one hundred dollars for the second year, and fifty dollars for any subsequent year. Also that for half or any less fraction of a year, half of a year's fee would be charged, and for more than a half year the fee for the whole year would be charged. One object of this discrimination against students who should remain but a short time, was to discourage the practice, which had prevailed to a great extent for many years, of students entering the School with the intention of remaining not longer than from one quarter of a year to a year. The result of the first year's experience of the change was a material increase in the income of the School, and an improvement in the character of the students. . . .

was made during the summer of 1871, brought about by the building of Mathews Hall in the College Yard.

"As the interval between Massachusetts Hall and Dane Hall was not long enough to receive so large a building as Mr. Matthews proposed to erect, in order to enlarge and improve this site, the Corporation caused Dane Hall to be moved seventy feet towards the south, and the brick office connected with the old President's House, and occupied by the Steward, to be turned one quarter round and thrust behind the house. Both the buildings moved were occupied as usual during the moving. . . . The Corporation took advantage of the moving of Dane Hall to substitute, on the west front, a brick porch for the painted wooden columns which, unfortunately, neither looked nor lasted like marble, and otherwise to improve the front of the building and its pediments and cornices. Messrs. Peabody and Stearns made the necessary drawings. In the summer vacation, the large lecture-room of the Law School was refurnished and put in thorough order; and two rooms in the lower story were made ready for use as a student's reading and conversation room, a portion of the entry being thrown into the westerly room so as to gain useful space and a western window without hurting the entry. One object in providing this reading-room was to prevent the Library from being used as an exchange or conversation-room, as had been the habit of the School." (1)

The Catalogue for 1871-72 made the following announcement:

The design of this School is to afford such training in the fundamental principles of English and American Law as will constitute the best preparation for the practice of the profession in any place where that system of law prevails. (2)

The method of instruction was stated as in the last Catalogue and it was also announced that:

Civil Procedure at Common Law will be taught by cases con-

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(1) See President's Annual Report for 1870-71.

(2) This announcement took the place of the old formula as to the design of the School which had appeared in catalogues for nearly 40 years prior to 1870-71. (See Chapter XXVIII.)

In the Catalogue for 1870-71 the following wording was used: "The design of the Law School is to afford a complete course of legal education except in matters of mere local law and practice for gentlemen intended for the bar in any of the United States."

taining statement of facts, in each of which cases counsel will be assigned, two on a side to plead to issue. The issue will then be argued before the Professor and decided by him. . . .

The degree of Bachelor of Laws will be conferred upon students who, having been in the School during the whole course of two years, shall have passed satisfactory examinations at the end of each year in the prescribed studies of that year; and also upon those who, having been admitted one year in advance, shall have been in the School one year, and have passed a satisfactory examination in the prescribed studies of the second year at the end of the year.

Students will be admitted to advanced standing upon satisfactory evidence in writing that they have diligently devoted at least one full year to legal study exclusive of any other occupation.

The system of appointment of Lecturers was continued, the following being chosen by the Corporation: Charles S. Bradley (May 3, 1871); John Lathrop (April 28, 1871); Nicholas St. J. Green (April 28, 1871); John C. Gray Jr. (April 28, 1871); Benjamin F. Thomas (April 28, 1872) in place of George T. Bigelow (April 28, 1871).

The Librarian, William A. Everett, resigned September 27, 1871, and Abraham W. Stevens was appointed September 29, 1871, at a salary of \$1,200.

Lectures were given as follows: by Professor Washburn twice a week in two courses on Real Property, and once a week for the first half of the year on Constitutional Law; by Professor Holmes, twice a week on Jurisdiction and Procedure in Equity, Evidence, and Bailments. Professor Langdell had three exercises a week on Contracts, and two on Sales, and in Civil Procedure at Common Law he heard arguments once a week on cases previously given out and pleaded to issue by counsel. Mr. Bradley lectured on Corporations once a week during half the year. Mr. Thomas delivered eight lectures on Wills and Administrations. Mr. Green lectured on Torts twice a week during the year, and on Criminal Law and Criminal Procedure once a week during the year; Mr. Lathrop lectured on Shipping and Admiralty once a week during half the year; and Mr. Gray lectured on the Conflict of Laws once a week during half the year.

During the year twenty-eight Moot Courts were held, nine by Professor Washburn, ten by Professor Holmes, and nine by Mr. Green. Three cases were given out for written opinions, two by Professor Washburn, and one by Professor Holmes. Two cases



in equity pleading were given out by Professor Holmes, the whole School, or as many as chose, taking part, by drawing a bill, answer, or other pleading, as the case might be.

At the end of the year, examinations were for a second time held, forty-five men being examined and three rejected. This was the first time that the passing of an examination at the end of the first year in studies for that year was a requirement to the receipt of a degree at the end of the second year.(1) Forty men were recommended for a degree, three of whom were entitled to the degree upon time and without examination in accordance with the system in force when they entered the School.(2)

Early in this academic year, a novel question was presented to the Law Faculty and to the Corporation, through the filing of an application by a woman, Miss Helen M. Sawyer, for admittance to the Law School as a regular member. As there was no statute or regulation applying specifically to this situation, the Corporation, after a full discussion September 29, and again October 13, 1871, refused the application.(3)

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(1) The effect of the new system of examinations was explained by the Dean in his Report for 1871-72 as follows:

"At the beginning of the year now under review, it became for the first time a condition of being admitted to the second year, for the purpose of becoming a candidate for a degree at the end of the year, that a student should have previously passed an examination in the studies of the first year. Accordingly, at the annual examination in June, 1872, there were twenty-six applicants for examination in the studies of the first year, of whom nineteen passed, and seven failed. At the examination for advanced standing, in September, 1872 (then held for the first time), there were twelve new applicants, of whom ten passed and two failed. Also three of those who had failed in June offered themselves again in September, and passed. Therefore, at the beginning of the year 1872-73, the number of those who were entitled to become candidates for a degree at the end of the year was thirty-two. Of these, thirty-one presented themselves at the end of the year for examination in the studies of the second year, and twenty-eight of them passed and received degrees, three being rejected. Degrees were also conferred upon two candidates who passed their examination in the studies of both years at the end of the second year, having been excused from passing an examination for advanced standing in the previous September, on account of sickness. There were thirty degrees conferred, therefore, and seven candidates in all were rejected; four in the first year, and three in the second.

At the annual examination in 1873, there were fifty-six applicants for examination in the studies of the first year (more than twice as many as in the preceding year), of whom forty-six passed."

(2) By vote of the Law Faculty, June 24, 1872, 70 per cent. was adopted as a minimum mark to entitle a candidate to a degree. It also voted not to admit any person to advanced standing who failed to pass in more than two of the first year subjects.

(3) Seven years later the subject came up again; and as the records of the Corporation of October 7, 1878, state, "a request for the admission of a woman to the Law School was considered and denied."

The year 1872-73 was again a year of doubt as to the future of the Law School under the new régime. The whole number of students connected with the School during the year was again far less than in the previous decade, being 117. Of these, however, 109 were in the School during the whole year. (1)

In this year the School lost one of its Professors, Nathaniel Holmes resigning as Royall Professor, May 6, 1872. (2) The system of Lecturers was again continued by the reappointment of Judge Charles S. Bradley (Oct. 9, 1872) and John C. Gray Jr. (Oct. 28, 1872) who divided between them the work of Professor Holmes, the former lecturing on Equity, the latter on Evidence; Benjamin F. Thomas, on the Law of Wills (April 8, 1872); Nicholas St. J. Green (May 20, 1872), on Criminal Law and Torts.

Two new appointments of Lecturers were made, the first being the distinguished ex-Judge of the United States Supreme Court, Benjamin R. Curtis, (May 6, 1872), who delivered a series of lectures on Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States; the second, Oliver Wendell Holmes Jr. (Sept. 24, 1872), on Jurisprudence, Holmes at this time having come into prominence by his brilliant editorial work and legal articles in the *American Law Review*.

The Librarian, Abraham W. Stevens, resigned August 7, 1872; and the present Librarian, John Hines Arnold, was appointed on that date. Mr. Arnold was born in Portsmouth, Rhode Island

(1) Dean Langdell, in his Annual Report, maintained the following optimistic attitude towards these figures:

"A comparison of these figures with those for the years 1870-71 and 1871-72 will show in a striking manner the effect of the measures which have been taken during the last two years to raise the standard of the School, and to discourage students from entering with a view to remaining only a short time. Thus, in the year 1870-71 there were no less than fifty-eight students who were in the School during part of the year only; in the year 1871-72 that class of students was reduced to thirty-one, while in the year now under review the reduction was in a greatly increased proportion. It is only in that class of students that there has been any falling off in numbers; those who were in the School during the whole year having numbered one hundred and seven in each of the years 1872-73. So far as regards receipts for tuition, the falling off in numbers has been much more than made up by the increase in the rate."

The same cheerful spirit was manifested by President Eliot in his Annual Report for 1872-73, in which he said that the decided raising of the standard of the School was like to cause only a temporary loss of students, and that "the quality of the young men who resort to the School has very conspicuously improved since 1870-71; nearly two-thirds of them, this year, are Bachelors or Masters of Arts; and the atmosphere of the School is full of zeal and scientific enthusiasm."

(2) Professor Holmes died in Cambridge, February 26, 1901.



Benjamin R. Curtis



April 4, 1839, was educated in the public schools, the University Grammar School at Providence and the Rhode Island State Normal School. For eight years, he was a teacher in various public schools in Rhode Island, and for seven years, associated with Joshua Kendall, as a teacher in his private school for boys in Cambridge.(1)

The Dean, in his Annual Report, for the first time stated officially his theories as to raising the standard of the School, and suggested three radical measures—all of which were, in later years, carried into effect:

The experience of the current year admonishes us that, with the present spirit of work in the School, and with our present organization, building, and equipment, one hundred and fifty students is about as many as we can do justice to; and if the School should increase much beyond that number, I think the question would arise whether it would not be wise to take further measures to raise the standard at the expense of numbers. Much has already been done in that direction, but I think something more remains to be done. I beg leave to call attention to three measures in particular, for want of some or all of which the School is falling short of what ought to be its aim. First, requiring a good academic education as a condition of admission; secondly, abolishing the practice of admitting students to advanced standing; thirdly, establishing a three years' course. The adoption of any one of these measures would be a great step in advance, and the adoption of them all would enable us to turn out a much higher grade of young lawyers than has hitherto been known in the United States. . . .

The year 1873-74 witnessed a gratifying increase in number of students, the whole number connected with the School being 141, of whom 121 were in the School during the whole year, an average of 131, being an increase of 18 over the preceding year.

Dean Langdell, in his Annual Report, noted the extraordinary revolution brought about by the various requirements as to examinations for degrees and the giving of the entire course of study each year.

Formerly, though the School was nominally divided into three classes, there were no actual classes, the practical effect of the formal division being seen only in assignment of counsel for Moot Court cases. A student was placed in the Senior class and was entitled to be senior counsel in Moot Court cases if he had

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(1) See Sketch in *Harv. Grad. Magazine*, Vol. XI.

studied law two years before entrance to the School or if he had been admitted as attorney in some court after one year's study. Now the division into classes had become so effectual that students of the first year seldom attended courses of the second year and vice versa; and "everyone is judged almost exclusively by the work that he does while in the School."

This fall of 1873 witnessed further one of the most important innovations introduced by President Eliot and Dean Langdell—the beginning of the term of service of James Barr Ames, as Assistant Professor. Mr. Ames was a young man of twenty-seven years of age, born in Boston, June 22, 1846, a graduate of Harvard College in 1868, and of the Law School in the preceding June, 1872. In 1871-72, he was Tutor in French and German in the College; and in 1872-73, Instructor in History.

The appointment had been made June 2, 1873, and was thus referred to by President Eliot in his Annual Report for 1872-73:

After due deliberation upon the expediency of appointing a young teacher in the Law School, the Corporation and Overseers united in the appointment of an Assistant Professor of Law in June last. The gentleman who is to bear the brunt of this new experiment in the constitution of a Law Faculty has some unusual qualifications for the place, for he is not only distinguished as a student, both in College and in the Law School, but he has had more than two years' experience as a teacher in the College; the experiment will therefore be tried under favorable conditions. It will doubtless prove that young teachers can do very useful work in the Law School as well as in the College, the Scientific School, and the Medical School; indeed, it would not be surprising if they could do a portion of the work of instruction better than older men.

The theory on which the appointment was made was thus described by President Eliot in his Annual Report for 1881-82:

Thus far, the Law School has taken its Professors, with one exception, from the ranks of the active profession; but, in the increasing difficulty of obtaining and retaining suitable Professors of that sort, it is a satisfaction to remember that there is another approved method of procuring Law Professors—the method which the great law schools of Continental Europe have followed, and which has produced not only great teachers but great jurists. Those schools have selected young men of mark who have shown a genius for law and a desire for the life of a teacher, and, having carefully tested on probationary appointment their capacity for teaching, made them Professors, at an age so early that the whole

vigor of their youth and prime could be thrown into teaching and authorship. The Law School has used this method once with conspicuous success, and it may be obliged to try the method again—without, however, adopting it as a policy.

The boldness and novelty of this venture was thus spoken of by President Eliot in his speech at the 9th Annual Meeting of the Harvard Law School Association June 25, 1895, held in honor of Langdell's twenty-five years' service as Dean.

Professor Langdell early advocated the appointment, as teachers of law, of young men who had had no experience whatever in the active profession. What a venture was that, gentlemen; what bold advice was that for the head of the School to give! This School had never done it; no School had ever done it; it was an absolutely new departure in our country in the teaching of law. I remember very well how reluctantly the Corporation and the Board of Overseers consented to the first experiment on this point, namely, the appointment for a limited term of five years of Assistant Professor James Barr Ames (prolonged applause). You may well applaud now, gentlemen, when the success of that experiment has been absolutely assured; but what was the courage which first suggested the experiment. Now that experiment, too, has not only been extended in our own Law School with perfect success but it has been adopted by various other law schools throughout the country. And what does this mean? What is to be the ultimate outcome of this courageous venture? In due course, and that is no long term of years, there will be produced in this country a body of men learned in the law who have never been on the bench or at the Bar, but who nevertheless hold position of great weight and influence as teachers of law, as expounders, systematizers and historians. This, I venture to predict, is one of the most far reaching changes in the organization of the profession that has ever been made in our country.

Only two Lecturers were appointed, John Lathrop, on Torts (Sept. 29, 1873), and John C. Gray, Jr., on Evidence (July 9, 1873). The Royall Professorship was filled, December 8, 1873, by appointment of James Bradley Thayer. Mr. Thayer was born January 15, 1831, at Haverhill, Mass. He graduated from Harvard in 1852, studied in the Law School 1854-56, where, in his second year, he won a prize for an essay on the *Law of Eminent Domain* which was printed in the *Law Reporter*. After his admission to the Bar in 1856, he became known as a young lawyer of unusually profound learning and sagacity. He wrote much for legal magazines and edited several law books. Shortly before his

appointment in the Law School, he had declined a Professorship in the English Department of the College.

The course of instruction given was as follows: Real Property, Criminal Law and Constitutional Law, by Professor Washburn; Torts, by Mr. Lathrop; Evidence, by Mr. Gray. Professor Langdell gave for the first time his course on Jurisdiction and Procedure in Equity, and also an advanced course on Contracts.

The most important change, however, in instruction came through the new Assistant Professor Ames, who adopted heart and soul Langdell's Case System, and gave instruction in Contracts, Sales and Pleading by this method. Langdell and Ames also heard Pleading cases, actually argued by the students, once a week.

Moot Courts were held as usual by the Professors, by Assistant Professor Ames and by Mr. Gray.

The Visiting Committee appointed by the Overseers for 1873-74, in their Report, adverted to the different methods of instruction employed in the School, describing them as "first, the use of text books with commentaries by the Professors and looking up by the students of cases given out as illustration; second, study of compilation of cases arranged to show the development of a branch of the law through successive stages."

The Report stated that there was "a diversity of opinion in the Committee as to what the method of instruction should be. The wisest course, in view of the high standard of proficiency attained is to leave to each Professor to teach by the method he can use most effectively."

The "high standard" of the School was further commended, notice being taken of "the entire decorum in the lecture room and assiduous taking of notes—a universal practice and as much a part of the exercise of the lecture room as the lecture itself."

The Report then continued:

Aside from the earnest devotion of the Professors to their work, undoubtedly the most potent influence in bringing the School to its present excellence is the firm application of the rule recently adopted (as to examination). The beneficial effect is everywhere seen. The young men have a large amount of work to do in a short time and must improve all their opportunities. . . . The necessity of qualifying for its degree makes the Law School, in fact as well as in name, a school of professional discipline for all its graduates.



During the year 1873, large contributions had been made by friends and alumni to meet the losses sustained by Harvard College through the great Boston fire of November, 1872; and it is interesting to note that in the Treasurer's Report (December 31, 1873) among the names of the contributors appeared C. C. Langdell \$1,000; J. B. Ames \$50; C. S. Bradley \$500; C. W. Eliot \$1,500.

On June 27, 1874, the Law Faculty voted to recommend to the Corporation not to confer the degrees of LL.B. on students under twenty-one, and to establish the requirement that a law student must be nineteen years of age on admission. This was adopted by the Corporation July 13, 1874.(1)

In the year 1874-75, the number of students again increased, being 144, of which 130 were in the School during the whole year, an average of 137.

The year was noted for the abandonment of the system of Lecturers, instruction being given exclusively by the four resident Professors.

Of this change President Eliot said(2) :

During the past five years the School has had the services, for longer or shorter terms, of several gentlemen, eminently fitted to teach the subjects upon which they lectured, who, though engaged in practice, were willing to lay before the students, in a systematic way, some of the condensed results of their own study and experience. The University could not have had the services of more eminent men, or of persons better qualified to demonstrate all the good effects of bringing distinguished practitioners into immediate contact with students of law as their instructors and exemplars. Nevertheless, the experience of these five years has convinced the Corporation that for the main work of the School their reliance must be upon resident Professors, who make teaching their business, and the welfare of the School their chief concern. Because practitioners of medicine and surgery are the best clinical teachers in a Medical School, it has been too hastily inferred that practitioners would make the best teachers of law; but the analogy is a false one. Medicine and surgery must be learned, partly, it is true, from books, but largely from the bodies of the sick and wounded; whereas law is to be learned almost

(1) By vote of the Law Faculty also, the former practice of giving certificates of attendance to all students who had been members of the School was abolished, and the Dean was restricted to giving such certificates only to persons who had passed satisfactory examinations in course in one or more subjects.

See Dean's Annual Report 1875-76, as to the working of this rule.

(2) See President's Annual Report for 1873-74.

exclusively from the books in which its principles and precedents are recorded, digested, and explained. The medical student must spend a large part of his time in hospitals; but a law student who should habitually attend courts, except during the short period when he is acquainting himself with office work and practice, would waste his time. The law library, and not the court or the law office, is the real analogue of the hospital. What the medical student needs from his clinical instructor is help in studying the sick and wounded; and the very qualities which make a man an eminent physician or surgeon, are those which make him a good clinical teacher. Moreover, the medical teacher must be a practitioner in order to have cases to teach with. It is far otherwise in law. The successful practitioner may or may not have the knowledge, tastes, and mental powers which go to make a good teacher of law, and the chances are against his having them. A good teacher of law in any high sense must be a thorough student by nature and habit; but it is well understood that a practitioner engrossed in business can hardly study any large subject with thoroughness, so manifold are the questions brought in quick succession to his attention. On the other hand, there are personal qualities of great importance to success at the bar, which are of little value in a teacher. It was with these items in mind that the Corporation, about two years ago, determined to add a young Assistant Professor to the Law Faculty, that they might see if it were practicable to breed Professors of law by the same gradual process by which competent teachers are trained up in other departments of the University. This interesting experiment has thus far been perfectly successful. The Corporation, however, do not overlook the advantage of having some men of large experience in actual practice as resident Professors of Law. While stating this general conclusion, at which they have arrived, with regard to appointments in the Law School, the Corporation gratefully acknowledge that they have repeatedly received, during the past five years, and particularly during the two years' vacancy in the Royall Professorship, invaluable aid in carrying out, or enriching, the programme of the School from distinguished practitioners who made a personal sacrifice for the sake of serving the School. It may be permitted to mention the name of one benefactor of this sort,—a man whose recent death has left a gap in the front rank of the legal profession which is not likely soon to be filled. When it was suggested to the late Benjamin Robbins Curtis that a course of lectures from him on practice in the United States courts would be of great service to the School, he immediately replied that he felt indebted to the School for the service it had rendered him in his youth, and that, though much occupied, he would give the desired lectures in testimony of his gratitude. In 1872-73, he delivered an admirable course of lectures on the *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States*, and when the Corporation sent

him the usual fee, he returned it, with the request that the amount be spent in buying books connected with the subject of his lectures for the Law Library.

Lectures were given by Professor Washburn on Real Property, Criminal Law and Procedure; Professor Langdell, to use his own language as Dean, "had five exercises a week" in Equity Jurisdiction and Procedure and "gave a new course of lectures on Civil Procedure at Common Law without a Text Book." Assistant Professor Ames "had three exercises a week on Contracts and also on Torts. He also had short courses on Civil Procedure at Common Law, and Bills and Notes."

Ames also at this time prepared the third Case Book ever used—a collection of cases on Trespass, Conversion and Defamation, which was later amplified, and became, in 1893, his *Cases on Torts*.<sup>(1)</sup>

At the beginning of this year, 1874-75, the new Royall Professor, James B. Thayer, began his work, giving lectures on Evidence and on Trusts. Unlike Assistant Professor Ames, Professor Thayer did not adopt the Langdell method, but confined himself for many years to the old system of instruction.

Though the Langdell method had now been in use for four years, it could not yet be said to be firmly established. Many lawyers and teachers still doubted its efficacy and its practicality. Its originator, however, was firm in his own belief, so firm that he left the system to prove its own value, utterly without aid of argument. As has been well said, "one of the most striking facts in the life of Professor Langdell is the deep silence which surrounds his work. He accomplished a revolution without getting into a controversy. As Professor Ames has pointed out, he never wrote anything in explanation or defence of his system after the brief statement made in the preface to his collection of *Cases on Contracts*." The bitter criticism directed at his methods by law reviews and by Law Professors was never answered by Langdell. He allowed his system absolutely to speak for itself.<sup>(2)</sup>

Meanwhile the financial condition of the School had become decidedly prosperous, owing to the raising of the tuition fee for

(1) See Preface to *Cases on Torts* (1893).

(2) *Christopher Columbus Langdell*, by William Schofield in *Amer. Law Register*, Vol. XLVI (1907). *Christopher Columbus Langdell*, by James Barr Ames in *Harv. Grad. Magazine*, Vol. XII.

first year students from \$100 to \$150 and the increase in number of students;(1) and on Jan. 25, 1875, the Corporation, on recommendation of the Law Faculty, raised the tuition fee for second year students also to \$150, to take effect Sept. 27, 1876(2). At the same time, the salary of the Professors was raised by the Corporation from \$4,000 to \$4,500 after March 1, 1875.(3)

A still more important result of the increase in financial prosperity was the establishment by the Corporation on March 18, 1875, of a new Professorship of Law, which they named the Story Professorship, "in memory of the distinguished services rendered to the University by Joseph Story, as a member of the Corporation from 1825 to 1845, and as Dane Professor of Law from 1829 to 1845, during which period the Law School increased greatly in numbers and importance. The instruction given by the new Professor relates chiefly to Mercantile Law."(4)

Thus tardily, thirty years after his death, did Harvard College pay tribute to the great work of Story in its behalf.

To fill this chair, John C. Gray, Jr., who had been a Lecturer in the Law School for several years, was chosen. Mr. Gray was born July 14, 1839, at Brighton, Mass. He graduated from Harvard in 1859, and attended the Law School 1860-62. Immediately after admission to the Bar in 1862, he joined the army as Second Lieutenant in the 41st Reg. Mass. Vol. Infantry, later serving in the 3rd Mass. Vol. Cavalry, and later on the Staff with the rank of Major. At the close of the war he formed a partnership with John C. Ropes (L. S. 1858-61). He was an editor of the *American Law Review* from 1867 to 1872 (Vols. I-IV).

The year 1875, however, is noted above all others for an event, important not only in the history of the School, but also in the history of legal education throughout the United States, the establishment of an admission examination applicable, from and after the beginning of the academic year 1877-78, "to all candidates for

(1) Tuition fees—1865-66, \$14,704.75; 1866-67, \$13,035.00; 1867-68, \$10,382.50; 1868-69, \$11,527.50; 1869-70, \$11,525.00; 1870-71, 13,524.00; 1871-72, \*\$16,179.00; 1872-73, \$15,075.00; 1873-74, \$16,975.00; 1874-75, \$17,700.00.

\*Fee of the first year raised from \$100 to \$150.

(2) By vote of the Corporation Nov. 10, 1879, the tuition fee for third year students was made \$150, from Sept. 1, 1879.

(3) At the same time \$4,000 of the Law School surplus was transferred to the payment of the salary of the Bussey Professor; and by vote of the Corporation Nov. 29, 1875, \$5000 of the surplus of 1874-75 was similarly transferred.

(4) See President's Annual Report for 1874-75.

the degree of the School who are not already Bachelors of Arts, Science, or Philosophy." (1)

This further factor in Langdell's scheme of legal education was brought to fruition by vote of the Law Faculty, February 27, 1875, approved by the Corporation, March 1, 1875 (2):

Of this action, President Eliot said (3):

(1) The first law school to require an admission examination, it appears, was the Boston University Law School, in 1872. Columbia Law School required such examination in 1876-77.

(2) "Voted that in our future Circulars and in future Catalogues of the University, the following announcement be omitted, to wit:

"No examination and no particular course of previous study is required for admission, except in cases of candidates for a degree who apply for admission to advanced standing; but the student, if not a graduate of a college, must produce testimonials of good moral character."

Voted that in our future Circulars and in future Catalogues of the University, the following announcement be inserted, to wit:

"The course of instruction in the School is designed for persons who have received a college education, and Bachelors of Arts will be admitted as candidates for degrees on presentation of their diplomas; but for the present, young men who are not Bachelors of Arts will also be admitted to the School for a degree, upon passing a satisfactory examination, as follows:

1. In Latin, in which subject candidates will be required to translate (without the aid of grammar or dictionary) passages selected from one or more of the following books: *Caesar's Commentaries*; *Cicero's Orations* and the *Aeneid of Virgil*.

2. In *Blackstone's Commentaries* (exclusive of Editor's notes).

Proficiency in French representing an amount of preparatory work equivalent to that demanded of those who offer Latin will be accepted as a substitute for the requisition in the latter language. Candidates will be required to translate (without the aid of grammar and dictionary) passages from standard French prose authors, and also to render into French, passages of easy English prose.

The Faculty will in their discretion permit some other language to be substituted for Latin or French, but a satisfactory examination in some language other than English will be insisted upon in all cases.

Voted that the following announcement, to wit:

"Students who are not candidates for a degree may enter the School at any stage of their professional studies, and at any time of the year, and may avail themselves of the advantages of the School in whatever manner and to whatever extent they see fit," be modified so as to read as follows:

"Persons who are candidates for a degree may upon producing certificates of good moral character, enter the School as "special students" (added Feb. 26, 1876), at any time, without examination, and avail themselves of its advantages in whatever manner and to whatever extent they see fit."

A supplementary vote was passed July 2, 1875 by the Law Faculty, as follows:

"Voted that at the beginning of the academic year 1877-78, and afterwards, the Faculty will accept a degree of Bachelor of Science or other degree, instead of a degree of Bachelor of Arts, when satisfied that it represents an amount of linguistic training equivalent in sum total to that implied in the requisition for admission."

(3) See President's Annual Report for 1874-75.

The important fact is that the University proposes to demand of all candidates for its degree of Bachelor of Laws, or Doctor of Medicine, evidence of some academic training, not so much for the sake of the knowledge which that training imparts, as of the mental power which it develops. The University in taking this action is only doing its duty to the learned professions of Law and Medicine, which have been for fifty years in process of degradation through the barbarous practice of admitting to them persons wholly destitute of academic culture. . . . The Schools of Law and Medicine which have sprung up all over the country during the last forty years have held no examinations for admission, and have required of candidates for admission no particular course of previous study. Had they demanded a reasonable amount of academic training, most of them could have procured it from a large proportion, at least, of their pupils. It is not the young men of the country, or their parents, who are responsible for the present degraded state of professional education, but the Faculties and the Governors of the modern American professional schools, who having but feeble faith in the value of academic training, or being afraid of diminishing the number of their pupils, failed to demand of candidates for admission an adequate general education. Thousands of ignorant, undisciplined men have frequently entered the legal and medical professions with the scantiest technical preparation, to their own lasting injury and that of the community, who would have found means to get some academic training, had any been required of them. In the meantime, the High Schools, Academies, and Colleges of this country have been deprived of the legitimate support which in every other civilized country they derive from the fact that only through them can the learned professions be reached. As one consequence, the number of young men who resort to colleges has diminished relatively to population during the past forty years, instead of rising as it should have done with the increase of general well-being. So long as lectures were the only means of teaching in the Law and Medical Schools of this University, the heterogeneous character of the class did not much affect the efficiency of the instruction, except so far as the lecturers felt obliged to adapt their teaching to the ignorant and untrained portion of their audience. But with the adoption of catechetical methods in both Schools, the presence in the recitation rooms of a considerable proportion of persons whose minds were rude and unformed became at once a serious impediment. The large use of examinations in writing also brought into plain sight the shocking illiteracy of a part of the students, and made the Faculties quite ashamed of some of their pupils. In the legal profession there are various walks, recognized by statute or by ancient usage in some countries, but existing everywhere with more or less precision of definition. It should be the aim of a University's Law School to train young men of good preliminary education and

average ability, taken by the hundred, for the higher walks of the profession. . . . The Law and Medical Faculties have not failed to observe that some very exceptional persons succeed in life, by force of great natural endowments, who had no early discipline or regular training of any sort; but they believe that such persons succeed not because of, but in spite of, their early disadvantages, and that their cases afford no argument against the general utility of thorough training, both academic and professional, and no argument in favor of laxity in admitting to learned professions. Genius has seven-leagued boots, but common men require a well-made road.

Reliance should also be placed on a more general principle, which is of great encouragement to all who desire American institutions of high education to make large advances in thoroughness and strictness. An institution which has any legal prestige and power, will make a money profit by raising its standard, and that either at once or in a very short time. Its demand for greater attainments on the part of its students will be quickly responded to, and this improved class of students will be in a marvellously short time so increase the reputation and influence of the institution as to make its privileges and its rewards more valued and more valuable. . . . In the Law School, within five years, a strict examination in writing for the degree has been imposed, where there was none before; the regular period of residence required for the degree has been made two years instead of eighteen months; examinations have been established for passing from one year of the course to the next; the tuition-fee has been raised, and the whole tone of the School changed from laxity to strictness.(1)

The action of the Corporation in assenting to so radical a change in the admission to the Law School became the subject for grave criticism by the Board of Overseers, in the fall of 1875.

A Committee on Reports and Resolutions appointed by vote of the Overseers, Dec. 31, 1875, of which William G. Russell, one of the leaders of the Boston Bar, was Chairman, reported the following resolutions:

*Resolved* that the grave change attempted by the Faculty of the Law School, assented to by the Corporation and published in the Catalogue for the year 1875-76, requiring a degree of A. B. or a preliminary examination before any student shall be admitted to the School as a candidate for a degree of Bachelor of Laws,

(1) On April 27, 1875, the Law Faculty stiffened the requirement for a degree by voting that every candidate for a degree in the second year be required in addition to the two required subjects to take at least five hours a week in elective subjects.

and giving notice that the course of instruction in the School is designed for persons who have received a college education, should have been submitted to the Board of Overseers for its approval.

*Resolved* that a policy which shall confine the Law School to college graduates is in the opinion of this Board injudicious.

These resolutions were considered at a meeting of the Overseers on February 9, 1876; and after hot debate were amended by a resolve, offered by ex-Judge E. Rockwood Hoar. "That this Board do not approve the announcement made by the Faculty of the Law School that the School is intended only for graduates of colleges."

Finally, however, at a meeting on April 12, 1875, all resolutions were withdrawn.

It may be seen from the above that Dean Langdell's path towards the accomplishment of his ends was not free from serious obstacles.

In the year 1875-76, the number of students made a larger gain than in any preceding year, rising to 173, with an average attendance of 163.

The new Story Professor, John C. Gray, began his work in the fall of 1875, giving lectures on Sales and on Partnership and other titles in Mercantile Law. He did not adopt, however, the Langdell method, until some years later. Professor Ames gave courses on Contracts, Torts, and Bills and Notes. Professor Washburn gave his usual courses on Real Property and Criminal Law and Procedure, and Professor Thayer gave Evidence and Trusts. Professor Langdell gave his Equity Jurisdiction and Procedure, Civil Procedure at Common Law and a new course on Civil Procedure under the New York Code.

In the spring of 1876, Dean Langdell carried into effect the fourth of his great ideas towards the raising of the standard of legal education—the institution of a period of three years study for a degree of LL.B.(1), the Law Faculty voting, February 26, 1876:

that it is desirable to establish a three years course of study and to require a satisfactory examination in the studies of each year as a condition of granting a degree; and that this change should

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(1) The Boston University Law School also established a three years term in this year, 1876.



take effect as to all students who enter the School at the beginning of the academic year 1877-78 or afterwards. (1)

As President Eliot said in his Annual Report for 1875-76.

The approbation of the governing boards of the University was really made known in advance of the definite action of the Faculty; but the Corporation formally sanctioned the step on the 24th of April, 1876, and have taken measures to provide against the possible reduction in the income of the School from tuition-fees in 1877-78 and 1878-79 by reserving \$3,543.52 from the surpluses of 1874-75 and 1875-76. They will also reserve the surplus of the current year for the same reason. These precautions are the more necessary, because two restrictive measures go into effect simultaneously in September, 1877; namely, the examination for admission, and the requisition of three years of study for the degree.

It is characteristic of the breadth of mind of those engaged in carrying out Langdell's ideas that they did not hesitate to adopt them, even in the face of probable consequent reduction in the number of students. (2)

The Commencement of June, 1876, was noted for being the first at which exercises were held in Sanders Theatre.

By vote of the Harvard College Faculty, the Law School (as well as the Divinity School, Doctors of Philosophy and Masters of Art) were each to have an oration on the Commencement Programme, and, February 26, 1876, the Law Faculty voted that the students of the second year should vote for six persons as candidates to deliver the oration, the Law Faculty to choose one

(1) As this change to a three years course was a radical one it was deemed advisable to reduce the other requirements somewhat. Hence on April 1, 1876, the Law Faculty voted that only two years of residence should be required of a candidate for a degree; and on June 24, 1876, it dropped the required pass mark to a general average of 65 per cent.

(2) That Langdell himself fully realized this probable effect is seen from his Annual Report for 1875-76:

"The want of adequate accommodation for the large numbers who now constantly resort to the Library would be a source of much embarrassment, were it not that we have a prospect of relief in the near future by a diminution of our numbers. We have in the School at this moment one hundred and ninety students, being an increase of twenty-eight over the number in the School at the corresponding date last year; and there is reason to believe that we shall reach not less than two hundred before the end of the year. It is reasonable to suppose that the changes which are to go into effect as to all students who enter the School after this year, have had some effect in increasing our numbers this year; but, whether this is so or not, we must expect a large falling off in the number of new entries during the next few years; and during the next two years there will be nothing to compensate for this falling off, as we shall not have a class of third-year students until the academic year 1879-80."

out of these six. (1) The Visiting Committee of the Overseers, by John Lowell, Chairman, reported on November 29, 1876, that the plan of giving the Law School representation in Commencement Exercises was calculated to advance the interest of the School.

In 1876-77 the number of students connected with the School increased to 199; and the Dean said in his Report that, the prediction, made in his Report of last year, that the establishment of an examination, together with an extension of the course of study from two years to three years, would cause an immediate and material diminution of our numbers, had not thus far been verified.

This was due in part, however, to the fact that the number of second year students and resident Bachelors of Law was very large.

The number of new entries showed the effect of the new rule as to admission examinations (though it had not yet gone into effect) by the falling off in non-college-graduates. The improvement in quality was shown by the fact that, since 1872-73, the number of Harvard graduates in the School had more than doubled. (2)

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(1) At the close of the academic year, 1880-81, a change was made in the method of obtaining candidates for Commencement parts; and, by vote of the Law Faculty June 14, 1881, all third year men who had obtained an average of 75 per cent. in the studies of the first and second years were to be admitted to write parts.

(2) One impediment to the prosperity of the Law School was pointed out by Dean Langdell in his Annual Report as follows:

"The Law School has always had one great disadvantage to contend against, to which all other departments of the University are strangers. I refer to the fact, that, while the legal profession is so far a strict monopoly that no one can enter it without formal admission, the Law School not only exercises no direct control over such admission, but it receives no recognition or countenance from those who do exercise such control. The utmost privilege that it has ever enjoyed, even in Massachusetts, is that of having the time actually spent by a student in the School received as an equivalent for the same length of time spent in a lawyer's office; and, beyond the limits of Massachusetts, it has seldom enjoyed that privilege to the full extent, unless we except those States in which candidates for admission are subjected to no test except that of examination. Nowhere has there ever been any recognition of our degree or our examinations."

The above remark was called forth largely by a recent rule of the New York Court of Appeals providing that for admission to the New York Bar a student must serve two years of clerkship, but that for one of these years his study in a New York Law School might be counted.

On this subject, President Eliot said in his Annual Report for 1876-77: "The Harvard Law School does not desire to have its graduates admitted to practice, either in Massachusetts or elsewhere, on the diploma of

In the matter of instruction, the most marked event of the year of 1876-77 was the resignation of Professor Emory Washburn, tendered April 1, 1876, to take effect in September. This step Washburn had been contemplating for a year, as he was out of touch with the many changes that had been going on around him; and, while never showing the least opposition or resentment, he felt that he was too old to come into complete sympathy with all these novelties. His resignation was accepted by the Corporation on April 3; and on April 14, President Eliot wrote to him:

The Corporation are well aware that your withdrawal from the School, which you have served so assiduously for twenty years, will entail upon it a severe loss. You have served the School by your high reputation as an author, by your regular teachings, by your constant accessibility to the young men who desired your counsel, by your ready sympathy with the students and hearty interest in their affairs, and by your eminent success as a practitioner before you accepted a Professorship. They thank you heartily for these varied services; they congratulate themselves that the School has had the benefit of your experience, your learning, and your character, for twenty years; and they felicitate you upon the universal respect and esteem which will accompany you, when at a ripe age and in the full vigor of your powers, you lay aside the active duties of your Professorship.

The vote of the Corporation was as follows:

*Voted* that this Board desire to express to Professor Washburn their unanimous sense of his constant devotion to the Law School during the twenty years that he has been connected with it, their high appreciation of his varied services to the University, and their regret at his withdrawal from the School.

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the School, and it asks no favors for its graduates at any examinations for admission prescribed by competent authority; but it feels justified in asking that its graduates, who have spent two or three years in the study of law under the guidance of learned and faithful teachers, should not be placed, as regards admission to the Bar, on a level with persons who have never opened a law book, as is now the case under the rules of the New York Court of Appeals. In view of its own honorable history as a national school of law, the School also thinks it a duty to protest against rules for admission to the Bar which have a tendency to make legal education local in character, and to recruit each Bar chiefly from its own locality. Rules which make discriminations in favor of the Law Schools of any particular States have this tendency.

What the Harvard Law School, and every respectable law school must desire at the hands of the States, or the Courts, is that time well spent in the School, as proved by passing its periodic examinations, should count towards admission to the Bar in any State, like time spent in an attorney's or counsellor's office in that State, except that one year of pupillage should have been passed in the State where the candidate applies for admission."

President Eliot said in his Report for 1875-76:

His high standing as an advocate before he accepted a Professorship, and the reputation which he acquired as an author after taking the Professor's chair, lent weight to his teachings; while his accessibility to young men, his ready sympathy with them, and hearty interest in all their affairs, gave him a strong personal influence with the students. The respect and good wishes of his colleagues, and of hundreds of young lawyers whom he had served, now widely scattered over the country, accompanied him on his retirement.

The loss of an instructor so universally loved was severely felt by the students, and by all the graduates who had sat under him; and it was well phrased in the report of the Visiting Committee to the Overseers, March 27, 1876, drafted by John Lowell, Chairman:

By the resignation of Professor Washburn, the School loses a teacher who for twenty years, with undefatigable zeal, has instructed and encouraged successive generations of young men, not only by his lectures, but by private counsels, and the example of his own career. The enthusiasm of the lecture room which the German jurists deem the chief advantage of oral teaching, was nowhere more felt than when he spoke, and was enhanced to his hearers by the recollection that they were listening to an author of national reputation, and to a lawyer who had been among the leaders of an able Bar. Professor Washburn will carry with him in his retirement, or in the new fields of patriotic activity which he may cultivate, the reflection that he will be remembered with grateful affection by large numbers of men who in their turn will fill the high places of the profession.(1)

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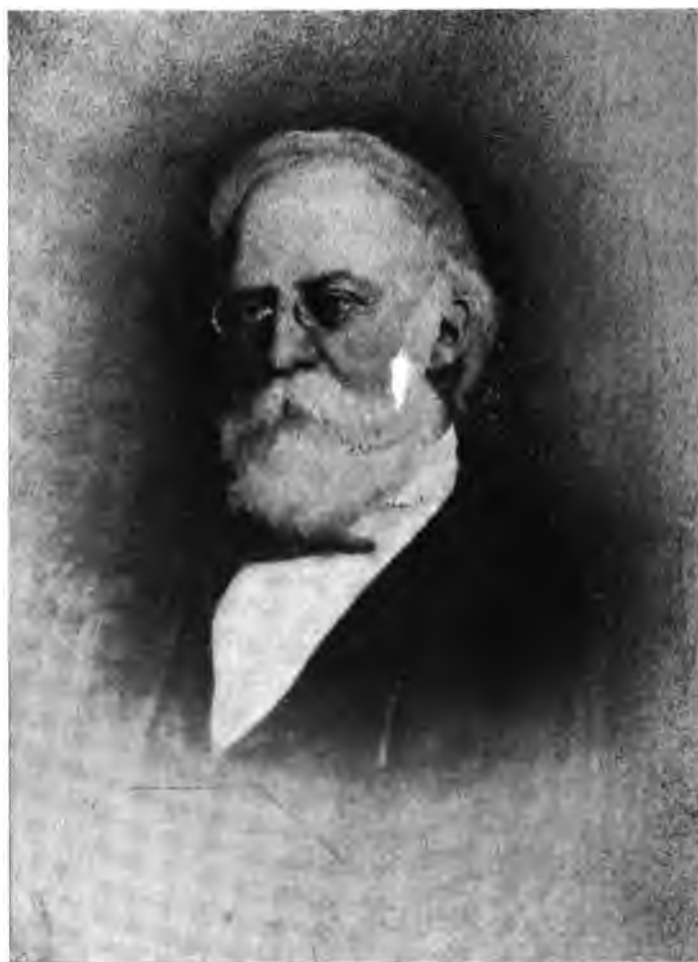
(1) When the news of Washburn's proposed retirement became public the *American Law Review* had said (Vol. X):

"Amongst all who have enjoyed the benefit of his instruction and influence . . . we can safely say that there is not one who does not feel towards him the strongest feelings of attachment and respect. With a sympathetic nature which made him the friend as well as the guide and counsellor of the young men who studied in his office or his Law School, he has been an inspiration and example to them in public spirit, in personal character and in all that is honorable in professional life."

And on his death March 18, 1877, it said in an obituary notice (Vol. XI):

"He had an even sunny temper, and, with decided opinions, no animosities—His hospitalities were very wide—the friendliest of men—he took an interest in everything that concerned human welfare—he loved to make other people happy and was always ready with counsel and assistance—his sympathies were inexhaustible and he carried into old age the freshness and energy of youth—the personal friend of every pupil in his office and of every student in his classes."





**Charles S. Bradley**

With the retirement of Washburn, the old order of things in the Law School may be said to have passed away. The new régime, now had full swing, and Dean Langdell assumed unfettered sway among his associates.

The Corporation was very fortunate in finding as Washburn's successor, a lawyer of the highest celebrity and of the most attractive personality, one who had already taught for several years in the School as Lecturer, Charles S. Bradley of Providence, Rhode Island. This selection (as Langdell said in his Annual Report for 1880-81) was "a brilliant and attractive one, and was urged by a strong and unanimous opinion in the legal profession of Boston." At the time of Bradley's appointment as Bussey Professor, on June 28, 1876, he was fifty-seven years old. He was born at Newburyport, Mass., in 1819, prepared for college at the Boston Latin School, and graduated from Brown University in 1838, the foremost scholar of a class distinguished for its men of learning and celebrity, such as T. A. Jenckes, Marcus Morton, President E. G. Robinson of Brown, and A. N. Arnold. After studying law in the Harvard Law School in 1840-41, in the same class with William I. Bowditch, Rufus King, Caleb W. Loring, and W. W. Story, and after further study in the office of Charles F. Tillinghast of Providence, R. I., he was admitted to the Bar in 1841. As a lawyer, he had an extraordinary quickness of apprehension, subtlety, fertility of resource, great native breadth of good sense and a vigorous understanding. "He was a thorough advocate and came very near being a great orator, having a commanding and dignified presence and a graceful yet energetic delivery."

While a particularly accomplished equity lawyer, he was retained in most of the great cases in the State. In February, 1866, he was elected Chief Justice of Rhode Island, by a Republican Legislature. Possessing however slight judicial temperament, and better pleased with the contests of the Bar, he resigned his office in 1868. Taking an active interest in politics, he was for many years the leader of the Democratic party in the State—a forlorn hope—and he was particularly active in the long and earnest contest to secure freer suffrage and a more liberal consti-

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Washburn's chief literary productions were his law books, delivered first in the form of lectures at the School, on *Real Property* (1860-62) and *Easements* (1863). He also wrote a *Judicial History of Massachusetts* (1840); *History of Leicester* (1860); *Testimony of Experts* (1866); and *The Study and Practice of the Law* (1871).

tution for Rhode Island. He was a lover and student of literature, and especially of art; and there was in him what one of his friends happily called, "a certain elegance about his intellectual structure and movement, a mixture of grace and sentiment and imagination with his logical and practical power which lifted him above the dry professional road." In person, he was strikingly handsome, with great charm of manner and social polish.

The course of instruction in 1876-77 may be best shown by the following Tabular Form, which was for the first time introduced into the Dean's Annual Reports.

(See Table on the following pages.)

Two things of special significance are shown in the above table—the marked decrease in text books used and the introduction of three new case books; *Ames' Cases on Pleadings*, *Langdell's Cases in Equity Pleading*, *Langdell's Cases on Sales*. The Case Book System was rapidly approaching complete acceptance.

Another sign of the fulfilment of the régime had appeared in the College Catalogue and Law School Circular of the previous year, in which all reference to "Methods of Instruction" had been dropped; and the old announcement, (in use with little variation since 1830), that, "the methods of Instruction will be by recitation, by lectures, expositions and by moot courts" disappeared forever.

Towards the close of the academic year 1876-77, Assistant Professor Ames resigned, March 26, 1877, his resignation to take effect September 1, 1877. The Corporation, however, felt that his services were too valuable to the Law School to be thus lost; and therefore on May 14, 1877, it voted: "to establish an additional Professorship in the Law School"; and appointed Ames as the new Professor, June 25, 1877.

The year 1877-78 was stated by President Eliot in his Report, as: "a year of transition, prosperous financially, but unsatisfactory in regard to results of the examination for a degree. Of the 81 students who entered to be candidates, only 66 presented themselves for examination in June 1878 and only 47 passed. The class was the last which entered before the establishment of admission examination, and also the last class entitled to take the degree upon a two years' course."

196 students were connected with the School during the year, of whom 173 remained all the year, an average of 183. The course of instruction remained the same as in the previous year,



FIRST YEAR.

REQUIRED SUBJECTS.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Real Property.	Prof. Gray.	<i>Washburn on Real Prop.</i>	Two.	81
Contracts.	Prof. Ames.	<i>Langdell's Cases on Contracts.</i>	Three.	85
Torts.	Prof. Ames.	<i>Ames's Cases on Torts.</i>	Three.	85
Criminal Law and Criminal Procedure.	Prof. Thayer.	<i>Blackstone, Book 4; Greenleaf on Evidence, Part V.</i>	One.	84

SECOND YEAR.

REQUIRED SUBJECTS.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Evidence.	Prof. Thayer.	<i>Best on Evidence; Stephen's Digest of the Law of Evidence.</i>	Two.	63
Jurisdiction and Procedure in Equity.	Prof. Langdell.	<i>Langdell's Cases in Equity Pleading; Forms of Procedure in Court of Chancery; Lectures without a text-book.</i>	Three.	61

## HARVARD LAW SCHOOL.

## ELECTIVE SUBJECTS.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Real Property.	Prof. Gray.		One.	12
Civil Procedure at Common Law.	Prof. Langdell.	<i>Washburn on Real Property.</i>		
Civil Procedure under the N. Y. Code.	Prof. Langdell.	Forms of Procedure in Court of K. B.; Lectures without a text-book.	One.	4
Trusts, Mortgages, and other Titles in Equity.	Prof. Bradley.	<i>Code of Procedure.</i>	One.	6
Sales of Personal Property.	Prof. Thayer.	No text-book.	Two.	59
Corporations and Partnership.	Prof. Bradley.	<i>Langdell's Cases on Sales.</i>	One.	27
Bills of Exch. and Promissory Notes.	Prof. Ames.	No text-book.	Two.	54
Agency and Carriers.	Prof. Gray.	No text-book.	One.	17
			One.	31

except that Langdell resumed his course on First Year Contracts.

Two significant changes were made, however; one, the dropping of the use of *Washburn on Real Property* and the conduct of the courses on Real Property by Professor Gray without any text book; the other the publication by Professor Ames of his *Cases on Bills and Notes*, this being the sixth case book in use.

A number of the students petitioned for a course of Massachusetts Practice; but the Law Faculty on May 14, 1878, voted: "that is it not expedient to give instruction in any local practice." (1)

The most important event of the academic year was the vote of the Law Faculty, June 28, 1878, establishing two parallel courses of study; an ordinary course leading to the degree of LL.B., and an honor course leading to the degree of LL.B. cum laude. The leading distinction between the two courses was that, in the honor course all subjects having in them a large element of Equity were required, while in the ordinary course those subjects, as well as all others after the first year, were elective. A leading object of the measure was to enable a student to obtain the ordinary degree without studying Equity (provided there were a sufficient number of other subjects taught to make up the required number of hours), and at the same time to encourage the student of Equity by specially honoring those who pursued it successfully to the full extent that it was taught.

It is to be noted that by the year 1877-78 the membership of the Corporation had completely changed. In 1877, Martin Brimmer, Rev. Joseph Henry Thayer and John Quincy Adams took the place of John A. Lowell, F. B. Crowinshield and Rev. George Putnam. In 1878, Alexander Agassiz succeeded George T. Bigelow; and Nathaniel Thayer's place had been taken by Francis Parkman in 1875. In his Annual Report for 1877-78, President Eliot said:

(1) There was considerable discussion during the year as to the value of the courses on Pleading and Procedure. Finally as Langdell stated in his Annual Report:

"The efforts hitherto made to teach the subject of Procedure (except those parts of it which belong to Pleading and Evidence) have not been attended with satisfactory results. Two elective courses of one hour a week each were given upon it during the year under review, but they were each attended by only a very small number of students, some of whom were resident Bachelors of Laws who were studying for the degree of A. M.; and, with a single exception, the latter alone presented themselves for examination. Both of those courses have accordingly been dropped for the present, and it seems not desirable to resume the subject hereafter, unless it can be done under better auspices."

When Judge Bigelow died (April 12, 1878) the President became the only remaining member of the Corporation as constituted when he entered it in 1869. Since December, 1875, every other member of that Board has been replaced. The President will never cease to remember with gratitude and affection all the members of the Corporation of the years 1868-75, on account of the consideration with which they treated him, when, a very young man, he entered on his responsible duties, and of the encouraging confidence which they always manifested in him.

In this year, occurred the first addition to the Law School endowment since the generous Bussey legacy in 1842. On January 5, 1878, a noted Massachusetts lawyer—George Bemis—died at Nice, France; and by will, dated October 23, 1872, he bequeathed the sum of \$50,000, subject to a life estate, to Harvard College to found a Professorship of Public or International Law. (1)

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(1) "I devise and bequeath to the President and Fellows of Harvard College the sum of fifty (50) thousand dollars, subject to the life use of my sister Sarah, as hereinbefore specifically set apart: said legacy to become absolute in case of my sister's death before my own. To have and to hold to said President and Fellows and their successors in office in trust for the establishment and maintenance of a Professorship of Public or International Law in the Dane Law School of said University. I have no restriction or condition to lay upon the Corporation in regard to the organization and management of such Professorship, other than that I desire that it may always be filled by some able and upright publicist and jurist, who shall bring to the office a competent fitness for that special department of study and practice, and of sufficient ability to discuss the current questions of national interest connected with it in such a way as to instruct and aid the popular and professional understanding of them. In that sense I should desire him to be not merely a professor of the science, but a practical co-operator in the work of advancing knowledge and good-will among nations and governments. For that object I should prefer, if practicable, that the incumbent should have had some official connection with public or diplomatic life, or at least have had an opportunity, by foreign travel or residence, to look at the United States from a foreign point of view, and so to estimate it as only one of the family of nations.

I will add that I make this bequest to my Alma Mater largely through the impulse of gratitude for her valued teachings, but more especially for the instruction which I derived from the legal department of her Schools through the lips of the late Judge Story, whose memory I cherish as one of the best of guides to study whom I have ever had the good fortune to meet, and whose friendly stimulus to exertion I shall always gratefully remember.

I may also add that the expression of my hope that this bequest will in some degree aid the promotion of the science of public law in the United States, particularly on the part of my brother lawyers, who I have thought have hardly been alert enough in coming to the aid of the National Government on the great questions of belligerent and neutral rights which have of late years so much exercised our country and England.

May it be the continuing pre-eminence of my country to know and practice a just and Christian neutrality, while other nations are cultivating the arts and prerogatives of war."

Mr. Bemis was born in Watertown, Mass., October 13, 1816, the son of Seth Bemis, (a successful manufacturer and a Harvard graduate of 1795). He graduated from Harvard in 1835, studied in the Law School under Story and Greenleaf, 1836-39, and was admitted to the Bar in the latter year. His acuteness soon brought him a profitable practice. The first appearance of his name in the Massachusetts Reports was in 1841, in three cases upon a subject with which his life was long associated,—reform in the treatment criminals.(1) In 1843, he was associated with George T. Bigelow (later Chief Justice) as counsel for the defendant in the noted murder trial of *Com. v. Abner Rogers* (7 Metc. 50) in which case, Chief Justice Shaw's opinion became the leading American authority upon insanity as a defence in criminal prosecutions. In 1850, he was associated with Attorney General John L. Clifford in the celebrated Webster murder trial (5 Cush. 295). Besides editing two full reports of these trials, he made the subject of crimes and their punishment the object of profound and philosophical study, maintaining an active correspondence with foreign jurists. In 1858, his law practice was suddenly interrupted by a severe hemorrhage of the lungs, and he was compelled to relinquish his work in this country and removed to Europe where he remained until his death in 1878, devoting his time to careful study of Public Law and the Law of Nations. During the Civil War, he entered with great vigor, in many newspaper articles and pamphlets, into the discussion of the prominent question of neutral and belligerent rights. He also rendered important service to the State Department in the investigations preparatory to the settlement of the Alabama Claims.(1)

The year 1878-79, said President Eliot in his Annual Report, "was an exceptional one; for there was no third year class, and yet the second year class was not entitled to take the degree because the new requisition of three years of study was already in force." The year was not a prosperous one. The new requirement for admission and for the degree caused a decided falling off in students, 169 being connected with the School during the year, with an average of 154 in attendance. Langdell, however, in his Report, stated that, "thus far there seems to be no ground for discouragement;" and Eliot noted that the reduction in numbers was not so great as occurred in 1872-73, when the course of study

(1) See *Wilde v. Commonwealth*; *Shepherd v. Com.*; *Plumbly v. Com.*, 2 Metc. 408.

was lengthened from eighteen months to two years, and otherwise reconstructed. (1)

The course of instruction as remodelled to conform to the new provision for Honor Courses was as follows:

(See Table on the following pages.)

The report of the Visiting Committee to the Overseers in 1878-79, made by Judge John Lowell, Chairman, stated: "The scheme of instruction is the result of profound and superlative reflection and is carried out by men of extraordinary ability and learning."

The year 1879-80 was a hard one for the School. Its financial condition was far from prosperous. There had been a progressive diminution in the net income of the Bussey Trust Fund, due to decrease in rent (one fourth of which came to the Law School), from \$35,349.96 in 1873-74 to \$7,010.58 in 1879-80. The number of students was still small, only 177 being connected with the School during the year, with an average attendance of 157. The School also suffered a severe loss in the resignation of Professor Bradley on March 10, 1879 (to take effect at the end of the academic year), of which President Eliot said in his Annual Report:

The Law School lost the services of one, whose professional eminence and large experience in affairs lent weight to his teachings, and whose cordial liking for young men made him a sympathetic and inspiring instructor. Unable to withdraw himself from an engrossing practice, Judge Bradley found the double work of a practitioner and a Professor too much for his strength, and reluctantly came to the decision that he must resign his Professorship. (2)

(1) There was one especially encouraging feature; for the Dean reported:

"The quality of applicants for admission to the School as candidates for a degree upon examination appears to be improving. In 1877 (the first year that an examination for admission was held), there were sixteen such applicants, of whom only seven were admitted wholly or in part upon examinations passed by them in Harvard College. In 1878, the number of applicants was fifteen, of whom seven were admitted and eight were rejected; and only one of the seven were excused from passing an examination in languages on account of examinations passed in Harvard College. In 1879, the number of applicants was eighteen, of whom twelve were admitted; and only two of the twelve were excused from passing an examination in languages on account of examinations passed in the College."

(2) The Report of the Visiting Committee to the Overseers for 1878-79 said:

"We have suffered a great loss in the resignation of Hon. C. S. Bradley whose love of practice, teaching and whose national reputation added to the renown of the School . . . It is still our hope that Judge Bradley's

FIRST YEAR.			
<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>
Real Property.	Prof. Gray.	None.	Two
Contracts.	Prof. Langdell.	<i>Langdell's Cases on Contract.</i>	Three
Torts.	Prof. Ames.	<i>Ames' Cases on Torts.</i>	Three
Criminal Law and Criminal Procedure.	Prof. Thayer.	None.	One
Civil Procedure at Common Law.	Prof. Ames.	<i>Ames' Cases on Pleadings.</i>	One
			50
			50
			50
			50
			45
			Number students examined.
			1871-72
SECOND YEAR.			
HONOR COURSE.			
<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>
Evidence.	Prof. Thayer.	No text-book.	Two
Jurisdiction and Procedure in Equity.	Prof. Ames.	<i>Langdell's Cases in Equity</i>	Two
Property.	Prof. Gray.	<i>Pleading.</i>	Two
Trusts, Mortgages and other titles in Equity.	Prof. Bradley.	None.	Two
		None.	Two
			27
			27
			27
			27
			Number students examined.
			1871-72





No attempt was made to fill his place(1); but Henry Howland (L. S. 1876-78) was appointed, April 9, 1879, an Instructor to give the course in Torts. With the loss of Professor Bradley, the last of the old-school teachers of law disappeared. Professor Ames was appointed to the Bussey Professorship, April 9, 1879.

The first year and second year courses remained the same as the previous year. Third year courses were added as follows:

(See Table on the following pages.)

November 11, 1879, Moot Courts were suspended for the year by vote of the Law Faculty; and as Langdell said in his Report:

The immediate occasion for this vote was the additional amount of instruction assumed by the several Professors, consequent upon the establishment of the three years' course. It was regarded, however, as an experiment which might result in the abolition of Moot Courts as a stated exercise, some of the Faculty having long doubted the utility of retaining them. With a view to trying the experiment more thoroughly, the several instructors announced to their classes their readiness to hear Moot Courts as a voluntary exercise; and the result was that four Moot Courts were held during the year, one by each of the Professors. . . .

For some years the interest in these Courts among the students had been dying out. The Visiting Committee had reported to the Overseers, in 1878, through Oliver Wendell Holmes, Jr.:

It is still ground for regret that Moot Courts attract less attention than formerly. The fact is in part due to the improved organization of the Club Courts where it is now the practice to have a bench of several judges instead of one as formerly. This

place may be permanently filled by one who like him combines large experience and high reputation with technical skill in teaching."

Of Bradley's resignation, the *American Law Review* said (Vol. XIII): "This is matter for great regret. He has held the place for three years with much advantage to the School. Chief Justice Bradley has never, since he was first invited to Cambridge, given ground for any confident belief that he should permanently remain; but it was nevertheless hoped that he might be induced to do so. . . ."

The chance of securing men of his experience and distinction as permanent instructors at the Law School seems to be less than it used to be. But it is to be hoped that the authorities of the University will not be insensible to the great importance of it."

(1) In 1881, the *American Law Review* in a review of Benjamin R. Curtis' *Jurisdiction, Practice and Peculiar Jurisprudence of Courts of the United States* said (Vol. XV):

"Few things are better for a young man than to be brought face to face with a master in his profession to witness the working of his mind to hear the expression of his doubts and his criticisms.

But then it must be a master—one such there is in Boston to-day and one in New York. Why will not Harvard College secure for its law students a course of lectures from Mr. Bartlett or Mr. O'Connor?"

## THIRD YEAR.

## HONOR COURSE.

## Required Subjects.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Jurisdiction and Procedure in Equity.	Prof. Langdell.	<i>Langdell's Cases on Equity Jurisdiction.</i>	One	8
Partnership and Corporations.	Prof. Ames.	No text-book.	Two	8

## Elective Subjects.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Sales of Personal Property.	Prof. Thayer.		Two	7
Bills of Exchange and Promissory Notes.	Prof. Langdell.	<i>Langdell's Cases on Sales.</i>	Two	7
Conflict of Laws.	Prof. Gray.	<i>Ames' Cases on Bills and Notes.</i>	One	3
Constitutional Laws.	Prof. Thayer.	No text-book.	One	3
Agency and Carriers.	Prof. Thayer.	No text-book.	One	7
Wills and Administration.	Prof. Gray.	No text-book.	One	7
Jurisprudence.	Prof. Gray.	<i>Austin on Jurisprudence.</i>	One	3

ORDINARY COURSE.

Elective Subjects.

<i>Studies.</i>	<i>Instructors.</i>	<i>Text-Books.</i> <i>Langdell's Cases on Equity Jurisdiction.</i>	<i>Exercises per week.</i>	<i>Number students examined.</i>
Jurisdiction and Procedure in Equity.	Prof. Langdell.		One	8
Partnership and Corporations.	Prof. Ames.	No text-book.	Two	14
Conflict of Laws.	Prof. Gray.	No text-book.	*One	*2
Constitutional Law.	Prof. Thayer.	No text-book.	†One	2
Agency and Carriers.	Prof. Thayer.	No text-book.	One	7
Wills and Administration.	Prof. Gray.	No text-book.	One	11
Jurisprudence.	Prof. Gray.	<i>Austin on Jurisprudence.</i>	One	
Sales of Personal Property.	Prof. Thayer.	<i>Langdell's Cases on Sales.</i>	Two	11
Bills of Exchange and Promissory Notes.	Prof. Langdell.	<i>Ames' Cases on Bills and Notes.</i>	Two	7

\*For the first half of the year.

†For the last half of the year.

adds to the interest and thoroughness of the discussion; and, as the students are engaged in cases very frequently, the Club Courts are more important than those presided over by the Professors, where the superiority of the judge is offset by the rare recurrence of opportunities for any one person to be heard.

Your committee are of the opinion that the practice of drawing counsel by lot instead of specially assigning them as was formerly the practice is one of the causes of the little interest now felt. (1)

It may be noted here that the Moot Courts were resumed in 1880-81; but were finally discontinued after March, 1897.

The year 1880-81 was again one of comparative uncertainty and depression.

The number of students connected with the School dropped to the lowest point since 1874-75, being only 161, with an average 149. The chief decrease seemed to be in the number of Harvard graduates applying for admission.

Dean Langdell, however, was not discouraged. (2)

(1) The practice of selecting counsel by lot, the senior counsel to be drawn from those students who had passed the examinations of the first year had been initiated by vote of the Law Faculty, Oct. 9, 1874.

The following is a table showing the decrease in the Moot Courts.

1870-71	once a week during the year.
1871-72	28.
1872-73	24.
1873-74	19.
1874-75	21.
1875-76	21.
1876-77	19.
1877-78	16.
1878-79	15.

(2) In his Report for 1880-81, the Dean said:

"The three years' course cannot yet be pronounced an entire success. It is true that another strong measure went into operation at the same time as the three years' course, namely, the examination for admission; but the latter, while it has reduced largely the number of candidates for a degree, has not reduced the total numbers of the School so much as it was expected to do; a large number of those who, but for the examination for admission, would have entered as candidates for a degree, having entered as special students. It is also true that there has not been a great falling off in the number of new men entering the School in each year, especially if it be borne in mind that the number of new entries, during the two years preceding the date when the three years' course went into operation (September, 1877), was abnormally large. In other words, it does not appear that the three years' course has prevented any considerable number of men from entering the School. . . .

It was fully expected, when the three years' course and the examination for admission were established, that their combined effect would be to reduce largely for a time the number of students in the School; but how great this effect would be, which of these measures would have the most agency in producing it, and in what particular way it would be produced, could not of course be foretold with any certainty. In some respects the expectations which were formed have not been justified by experience.

The problem before the School at this time was to devise some measures by which the degree of LL.B. and the third year course needed to attain it might be made more attractive. Two suggestions were made by the Dean—an increase in the amount of instruction, and an increase in the number of scholarships for the benefit of students unable to bear the heavy expenses of a three year course. ||

Unfortunately the pecuniary conditions of the School was not such as to make possible either of these improvements. The Corporation had no funds to pay another Professor, or even to fill the now vacant Professorship. Expenses were already exceeding income. Although one hundred and twenty scholarships had been established in the College, mostly from gifts, "not a dollar had ever been given by anyone towards furnishing pecuniary aid to students in the Law School," outside of the four Bussey Scholarships established by the Corporation. "More scholarships would enable the School to draw annually from the different colleges"—said the Dean—"a few of their ablest and most promising men, whom it now has no chance of obtaining."

Without some such attraction as additional scholarships, the Dean was inclined to believe that the three year course could not be a success. Mere opportunity for additional instruction did not seem to be able to hold the students.

For example, the number who pass the examination for admission is much smaller than was anticipated; but, on the other hand, the number who enter as special students is much larger than was anticipated. So in regard to the three years' course: it was expected to deter men from entering the School rather than to cause them to leave before completing the course; and it was hoped that a third-year class would compensate largely for the falling off in the number of new entries. In a word, it was not anticipated that these two measures would have their greatest effect in reducing the ratio of those who take the degree to the whole number who enter the School. Such, however, is the result of our experience thus far. It is our degree, therefore, if anything, that is in immediate danger."

(1) "The great value of a few such men added to the School would consist partly in the influence that they would have upon the School itself, and partly in the increased reputation that they would soon give the school throughout the country. The influence they would have in the School would be of great immediate and certain value. Individual students in such a School are governed largely in their opinions and actions by what may be called the public opinion of the School, and in forming the opinion a few of the most prominent students are chiefly influential.

It must always be remembered that the Law School can only accomplish its objects fully by means of students of high grade, and that the supply of such students is very limited in number at best; and if from this limited number must be subtracted all those who, having already incurred the expense of a good college education, cannot afford the heavy additional expense of three years in the Law School, the number from which the School can draw will be small indeed."

There were now twenty-nine hours of instruction, as against ten hours, prior to 1870. The number of elective studies had already been increased; but the students seemed inclined to crowd the bulk of the work intended for three years into two. The course of instruction remained practically the same, this year, as before, with the addition of a course on Evidence by Professor Thayer and on Trusts and Mortgages by Professor Ames, as elective in the third year. Mr. Howland continued as Instructor in Torts. In this year, Professor Ames published in collected book form his *Cases on Bills and Notes*; and in the preface dated June 1, 1881, he said: "That the innovation in the method of legal education has proved a marked success in the Harvard Law School is well known to all those who are familiar with the history of the School during the last ten years," and he gracefully, though perhaps too modestly, gave added credit to Professor Langdell for parts of the valuable "Summary" attached to the book by stating, "It is only just to say that the credit of very much of what seems in this edition the most valuable part of the summary belongs not to the pupil but to the master."

## CHAPTER XLIII.

### WHAT THE CASE SYSTEM REALLY IS.

Of the Langdell System, Professor Baldwin, who is by no means an adherent, correctly says, that it is fundamentally different from that which had ever prevailed at any seat of legal learning in the history of the world. Less correctly, he describes it as, "a new theory of legal instruction, according to which its main end from the beginning should be to encourage and assist the student in the study and analysis of judicial precedents and he should be left to pick up and arrange the elementary principles of law, as he best can, for himself".(1)

In order to appreciate correctly the Langdell System, it is necessary to understand first what that system was intended to develop. Much of the misunderstanding and many of the attacks upon Professor Langdell's theories have arisen from a difference in the views of the proposed object of legal education. One body of legal teachers proceeds on the theory that the object of a law school should be exclusively, "to teach a student the law." This view was expressed by Edmund Wetmore, President of the American Bar Association, when he said: "The primary object of legal instruction is to teach the student what the law is upon a sufficiently large number of topics, to give him a general knowledge of all its most important branches."

With this standpoint, the Harvard Law School teachers have little in common. They believe that, "that method which best trains the student in legal thinking and in legal reasoning is necessarily the best method for the student of law".(2) As Professor Ames recently said(3):

We seem to differ radically as to the object of the three years at the Law School. I should infer from the paper that the author's object was knowledge. The object held up by us at Cam-

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(1) *The Study of Elementary Law*, by S. E. Baldwin, *Yale Law Journal*, Vol. XIII (1903).

(2) See Paper by James Brown Scott in *American Law School Review*, Vol. II (1906).

(3) *Address before the Association of American Law Schools* (1907).

bridge is the power of legal reasoning, and we think we can best get that by putting before the students the best models that can be found in the history of English and American law, because we believe that men who are trained, after examining the opinions of the greatest judges that the English Common Law system has produced, are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems than they would be by taking up the study of the law of any particular State. In my own case, I am sometimes asked by first-year men what the law of Massachusetts is on the point under discussion, and I always tell them that sitting in this chair I do not know, but that if they speak to me after the hour I will tell them. That is to say, our School aims above all things to be a national school and not a local school.

Training in legal reasoning and the acquirement of knowledge of legal principles by study of cases, is what the teachers of law at Harvard seek to give to their students. No one has better expressed the need of this teaching of fundamentals than Edward J. Phelps, formerly Professor of Law at Yale(1):

If I were to frame a law school upon my own, old-fashioned idea of what it should be, it would attract no students. It would be like the common school by the side of the academy. The slenderness of its library—small but well selected, rich principally in what it did not contain, and jealous of new accessions—the simplicity of its curriculum, the moderation of its speed, the apparent modesty of its extent of attainment, would be likely to excite derision. Such was the school which I had the advantage of attending in the happy days of my youth. Out of such schools, and from the same system of instruction outside of them, have come a large proportion of the greatest lawyers I have ever seen, or ever expect to see. What was taught there was only fundamental, but it was taught effectually. It sank into the student's mind, and wrought itself into his ideas and his modes of thought. The habit of reasoning from principles to conclusions gave him, if he was capable of attaining it, the large comprehension and the logical power which are the characteristics of the sound lawyer, and the true weapons of the advocate. On the foundation thus formed, the superstructure can be rapidly built in after life. To a mind so trained, no legal propositions however new will be difficult; no complication of facts, however unusual, will embarrass the application of the rules of law, or put justice out of court. Beware the man of one book is an old proverb. Beware of the lawyer of few books, wisely chosen and entirely under-

(1) *Methods of Legal Education*, by Edward J. Phelps, *Yale Law Journal*, Vol. I (1892).



stood, is a good adaptation of the proverb to the matter in hand. Asking lately the leader of the Connecticut Bar how it came to pass that the lawyers who framed the United States Constitution had obtained such a mastery of legal principles and such a cleanliness in the expression of them as are there displayed, he replied "Why, they had so few books!"

What the Langdell System is can best be told in the words of its prominent exponents in the Harvard Law School.

Professor William A. Keener thus stated it in 1888(1):

While this method of teaching does not at all proceed on the idea that the Common Law is wanting in jurists, its advocates regard the adjudged cases as the original sources of our law, and think that it is better for the student, under proper advice and guidance, to extract from the cases a principle, than to accept the statement of any jurist, however eminent he may be, that a certain principle is established by certain cases. When the student has by the study of cases grasped a principle, it has assumed to him a concrete form, and he can apply it, because it was by studying it in its application that he has acquired his knowledge. Under this system the student must look upon law as a science consisting of a body of principles to be found in the adjudged cases, the cases being to him what the specimen is to the geologist. . . . This method of teaching does not consist in lectures by the instructor with references to the cases in support of the propositions stated by him. The exercises in the lecture room consist in a statement and discussion by the students of the cases studied by them in advance. This discussion is under the direction of the instructor, who makes such suggestions and expresses such opinions as are necessary.

The student is required to analyze each case, discriminate between the relevant and irrelevant, between the actual and possible grounds of decision. And after having thus discussed a case, he is prepared and required to deal with it in its relation to other cases.

In other words the student is practically doing, as a student, what he will be constantly doing as a lawyer. By this method, the student's reasoning powers are constantly developed; and while he is gaining the power of legal analysis and synthesis, he is also gaining the other object of legal education—namely, a knowledge of what the law actually is.

And again, in 1894, Professor Keener described it as being based on the following conclusions(2):

(1) Preface to *A Selection of Cases on the Law of Quasi Contracts*, by W. A. Keener (1888).

(2) *The Inductive Method in Legal Education*, by W. A. Keener—*Amer. Law Rev.*, Vol. XXVIII (1894).

1. That law, like other applied sciences, should be studied in its application, if one is to acquire a working knowledge thereof. 2. That this is entirely feasible, for the reason that, while the adjudged cases are numerous, the principles controlling them are comparatively few. 3. That it is by the study of cases that one is to acquire the power of legal reasoning, discrimination, and judgment, qualities indispensable to the practicing lawyer. 4. That the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which in no small degree distinguishes the good from the poor and indifferent lawyer. 5. That the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning. 6. That the student, by the study of cases, not only follows the law in its growth and development, but thereby acquires the habit of legal thought, which can be acquired only by the study of cases, and which must be acquired by him either as a student, or after he has become a practitioner, if he is to attain any success as a lawyer. 7. That it is the best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a lasting impression upon his mind. 8. That it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence, and self-reliance on the part of the student.

. . . The distinctive feature of the Case System is not the *exclusive* use of cases but that the reported cases are made the basis of instruction, not used merely as illustration. . . . The object of the Case System is not to have students memorize cases, but to analyze them.

And again, in 1892, Professor Keener explained with much clearness what the Case System was *not*(1) :

- 1. It does not consist in the study of isolated propositions of law.
- 2. It does not proceed on the theory that the law consists of an aggregation of cases.
- 3. It does not proceed on the theory that to learn law one must memorize cases.
- 4. It does not proceed on the theory that law is to be taught or learned in a law school by the reading of cases merely.
- 5. It does not leave the student to deduce the principles of law from the cases by himself. . . .

The Case System consists in putting into the hands of the student a number of cases on any given subject, taken not at hap-

(1) *Methods of Legal Education*, by W. A. Keener, *Yale Law Journal*, Vol. I (1892).

hazard but selected by the professor with a view to developing the law on that subject. The theory on which this proceeds is that it is only by regarding law as a science that one can justify its being taught in a University, and regarding it as a science, the student should not only be encouraged to investigate the law in its original sources, but should be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access.

The Case System then proceeds on the theory that law is a science and as a science should be studied in the original sources, and that the original sources are the adjudged cases, and not the opinions of text writers based upon the adjudged cases.

But the law is an applied science, and therefore to appreciate thoroughly the principle involved in a given topic, the student should deal with it in its application, and as he learns these principles in their application, they are not a mere abstraction, but have assumed a concrete form, and he is prepared to apply them in mastering new problems. . . . From my explanation of the system it is evident:

1. That it is not open to the charge of regarding the law as a mere aggregation of cases. Indeed the system rests on the fundamental doctrine that while the adjudged cases are numerous the principles controlling them are comparatively few and can and should be thoroughly mastered.

2. That it does not proceed on the theory of learning law by the reading of cases only, as the student has the constant help of the instructor by way of suggestion, criticism and the formal statement of proposition of law.

3. That the system cannot be open to the objection that the student is required to deduce the principles from the cases by himself . . .

4. That instead of involving the memorizing of a lot of cases, the danger to guard against is that the student may not have a sufficient regard for decisions which in his opinion are not based on principle . . .

5. That as the cases are selected to develop a particular branch of law nothing is more erroneous than to suppose that the system consists of the study of isolated propositions. To say that the study of cases is only the study of isolated principles is to deny that the law has been developed through the case.

To the accusation that the Case System produces mere "case lawyers," Professor John C. Gray has made the following adequate answer (1) :

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(1) *Cases and Treatises*, by John C. Gray, *Amer. Law Review*, Vol. XXII (1888).

There are two things to be acquired in a legal education; first, the knowledge of a certain number of facts; second, the habit of correct reasoning on legal questions with a ready and accurate perception of legal analogies; and the second is much more important than the first. . . . Much of the criticism that has been raised by the study of cases in the Harvard Law School has been really aimed at the subjects which have been selected for study. . . . One other misunderstanding has arisen from a mere verbal similarity. "I do not believe in case-lawyers" it has been said to me more than once, as if that were a knock-down argument against the method of study by cases. By a "case-lawyer" I suppose is generally meant a lawyer who has a great memory for the particular circumstances of cases, but who is unable to extract the underlying principles. But the "Case System" has no tendency to produce lawyers of this type. . . . It uses the cases merely as material from which the student may learn to extract the underlying principles. . . . The expression "Case System" suggests a hidebound and stereotyped mode of instruction. Nothing can be further from the truth. . . . The styles of teaching of the different Professors are as unlike as possible. We agree only in making cases, not text books, the basis of instruction. . . . I am far from thinking that the method of case study as practised at Cambridge is the final word on legal education. . . . All I contend is that the method of study by cases is the best form of legal education that has yet been discovered. I should be sorry indeed if anything I might say would seem to disparage the former mode of instruction in the Harvard Law School. If the tone of the School has been raised, it is due more to the three series of severe annual examinations required for a degree than to any change in the mode of study.

Although an important object of education is to tell the student what others have found out, a more important object is to teach him to find things for himself. . . . And in law, no better way has yet been devised to make the student work for himself, than to give him a series of cases on a topic, and compel him to discover the principles which they have settled and the process by which they have been evolved. A young man, thus trained, not only learns the Common Law, but he is imbued with its historical and progressive spirit. . . . To begin with text books is to begin at the wrong end.

The methods by which the Case System is applied in actual operation were described by Professor James B. Thayer, in a discussion before the American Bar Association, in 1895, as follows(1):

The Case System at Harvard is not a method or system of

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(1) See *Amer. Bar Assn. Proc.*, Vol. XVIII (1895).

teaching. It is a system of *studying* law. The whole essence of the Case System as we understand it at Harvard is that instead of placing in the hands of a student a text book on which he has to prepare himself for the exercises with the instructor there is placed in his hands a very carefully chosen series of cases selected by an expert and he is expected to prepare himself upon them. The whole essence of the Case System lies then in this preparatory study of the subject in hand by very carefully selected cases.

In regard to the teaching and the instruction I may mention that at Harvard where I have been for twenty-one years nearly, and where Dr. Langdell has been for a period of twenty-five years, there has not been a moment when there has not been every variety of method of instruction. Every instructor uses his own method.

For many years I lectured, although I used the Case System. At present my method—and it is the more common method of the School, is that of questioning the men on the cases. The whole exercise is frequently taken up with questions on both sides from the students to the instructor as well as from the instructor to the student on the cases and there is an abundant opportunity for remark, for comment, and for lecture, and there is plenty of it.

I make mention of that because I hope it may correct a misapprehension as to the meaning of what is called the Case System. As to the mode of teaching, there are as many as there are Professors.

And to the remark of another Law Professor made in the course of the discussion that he thought “the distinction between method of teaching and method of studying is more sound from an acoustic sense than it is in making a real essential distinction,” Professor Thayer replied, that the distinction between a method of teaching and a method of studying appeared in Cambridge a real and very important distinction, and “while we have always had there in recent years every variety in methods of teaching, we have long tried only one method of preparatory study” by the student.

And in the preface to his *Cases on Constitutional Law* (1895) Professor Thayer said:

The method of legal study with which his (Langdell's) name is associated, regarded as a mere method of investigation, was indeed no novelty at all; lawyers have always known well enough the necessity of following it in working out their problems. But Dean Langdell, early in life, had the sagacity to apply it in his own self-instruction in law, and in his greatly valued help of fellow students; and when he came back to the School as a Pro-

fessor, he had the courage and foresight to introduce here the same method of study, and to lay down for himself a mode of instruction which vigorously drove his pupils to adopt it.

Of teaching, there has never been at this School any prescribed method. There never can be, in any place where the best work is sought for—every teacher, as I have said elsewhere “in law as in other things has his own methods, determined by his own gifts or lack of gifts—methods as incommunicable as his temperament, his looks or his manners.”

But as to modes of study, a very different matter, Dean Langdell's associates have all come to agree with him, where they have ever differed, in thinking, so far at least as our system of law is concerned, that there is no method of preparatory study so good as the one with which his name is so honorably connected—that of studying cases carefully chosen and arranged so as to present the development of principles. Doubtless the mode of study must greatly affect the mode of teaching; if students are to prepare themselves by studying cases their teachers also must study them.

And moreover while good teaching will differ widely in its methods, there is at least one good thing in which all good teaching will be alike; no teaching is good which does not rouse and “dephlegmatize” the students—to borrow an expression attributed to Novalis—which does not engage as its allies their awakened, sympathetic, and co-operating faculties. As helping to that, as tending to secure for an instructor this chief element of success, I do not think that there is or can be any method of study which is comparable with the one in question.

Professor John C. Gray has also given an interesting statement of the practical workings of the system(1):

While in most law schools the text book is the basis of instruction, and the lecture and sometimes a reported case is employed to explain or illustrate (or it may be to contradict) the text book, with us the *predominant* mode of study is to make the reported cases the basis of instruction and to use oral instruction and the consultation of text books as aids in drawing out, formulating and classifying the principles involved in the decisions. . . . Among the reasons why this practice has been so generally adopted here are the following:

(a) It accustoms the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only a logical independence, but as a living thing, with a continuous history, sloughing off the old, taking on the new. The acquisition of this attitude towards the law is likely

(1) *Methods of Legal Education*, by John C. Gray, *Yale Law Journal*, Vol. I (1892).

to be deemed of fundamental importance according as a Professor is a believer in the Common Law. We are all here firm believers in it. We desire that the students may be filled with its spirit.

(b) The reading of text books on a subject of which one as yet knows nothing is dreary work; a student is apt to come from it into lecture with practically an empty mind. But we find that students in reading cases, whether they approve or disapprove or are in doubt or perplexity, yet come into lecture interested, and eager to express their views or to have their doubts determined or their perplexities removed. . . .

(c) To extract law from facts is *the* thing which a lawyer has to do all his life; to do it well makes the successful lawyer; to do it pre-eminently well makes the great lawyer; a student cannot begin too early.

(d) Lectures and questions on lectures are apt to be and perhaps necessarily must be adapted to the students of slower apprehensions.

(e) Many bright young men in school and college develop an extraordinary capacity for having other people's ideas pumped into them, and win rank and reputation thereby, but they have never intellectually "labored" in their lives. Our mode of study is a sharp break in their habits and traditions. The result is at first perturbing, often amusingly so, but it is invariably salutary.

(f) This dealing with actual cases is an effectual corrective to unreal and fantastic speculation, which is the most dangerous tendency of academic education.

To the important effects of this system upon the Professor himself, Professor Jeremiah Smith has borne witness (1):

It has been claimed for that system again and again that it has the merit of compelling the student to work.

I can assure you, it has also the merit of compelling the instructor to work. As a matter of fact Professor Langdell's system is very hard on the teacher. We have been accustomed, most of us, in preparing arguments on questions of law before courts of last resort, to prepare our proposition with great accuracy. I speak advisedly when I say that it requires a more careful preparation to meet the class under this system in the class room.

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(1) See Speech at the Dinner of the Harvard Law School Association, in 1891.

## CHAPTER XLIV.

### THE LANGDELL PERIOD 1882-1895.

Though the year 1881-82 showed no increase in the number of students, it marked the turn in the tide of the School's prosperity; for in that year came the first of the great series of benefactions which have since provided so ample an endowment for the institution. In his Annual Report for 1880-81, President Eliot had pointed out that: "Experience has shown during the past two years that four Professors with the aid of an Instructor in Torts cannot give the amount and variety of instruction which are needed to make the three years course as attractive and useful as possible." The appointment of a fifth Professor was, however, impossible, without more tuition fees or other resources. "The best solution," he said, "of the difficulty is the adequate endowment of a new Professorship. Surely the Harvard Law School has deserved well enough of the community and the profession to count with confidence upon soon receiving this addition to its means of usefulness."

Just a year after this appeal, a generous benefactor came forward with an endowment of \$90,000—the largest sum which had ever been given to the Law School. Record of this gift was made in the Corporation Records January 23, 1882 as follows:

A letter was presented from a gentleman, who requests that his name be withheld for at least some years, offering to give the sum of \$90,000 in the form of a note payable in one year and bearing interest at the rate of 5% as the foundation for a new Professorship in the Law School—and it was *Voted* that the President and Fellows gratefully accept the generous and welcome offer and that they will gladly carry out the wishes of the donor as expressed in his letter. *Voted* to establish a new Professorship of Law to be hereafter named in accordance with the request contained in the letter just read to the Board.

To fill this new Professorship, Oliver Wendell Holmes, Jr. (L. S. 1864-66) who had already served as a Lecturer on Jurisprudence, was appointed. For many years in accordance with the expressed wish of the donor, the name of the founder of this



Professorship was kept a profound secret; but on January 30, 1893, the following vote appeared in the Corporation Records:

The Treasurer having . . . stated that the obligation of secrecy no longer exists it was *Voted* that the Law School Professorship which was founded in 1882 be hereafter called the Weld Professorship of Law, in memory of the late William F. Weld Junior who generously gave \$90,000 to found it; but would not allow the name of the giver to be made known during his life.

William F. Weld Jr., whose name was then henceforth to be ranged with those of Joseph Story, Nathan Dane and Benjamin Bussey, as one of the great benefactors of the Law School, was born in Boston, February 21, 1855, graduated from Harvard in 1876 and attended the Law School 1876-79. A man of wealth himself, his time was chiefly occupied as trustee of the estate of his grandfather, William F. Weld. He was a passionate lover of out door sports and especially of yachting, being one of the syndicate, who, in 1885, built the cup defender, the "Puritan." He died January 9, 1893, leaving to Harvard College, by will, the sum of \$100,000 for general purposes.

In the account of his life, given in the Seventh Report of the Class of 1876, it is said:

Weld was a man of the broadest generosity; he received his greatest pleasure from making those about him happy. No one who was ever a guest on board of his yacht or at his house can forget his thoughtful hospitality. He had a keen interest in public affairs, in science, art, and literature and his active mind and shrewd common sense made him a man of influence wherever he went. He looked at his wealth as a trust fund, to be used by him in helping the community in which he lived. He was the most loyal of Harvard men, and it is pleasant to think that the benefactions which he and his family have heaped upon the College will keep the name of "Weld" dear to Harvard Men.

One other gratifying addition to the resources of the School was made this year through the gift of a fund for the purchasing of books for the Library. A number of lawyers interested in the School had sent out, during the winter, circulars calling the attention of the public to the fact that the total endowment of the Law School was only \$48,070.63, while that of the Scientific School was \$765,519.71, of the Divinity School \$310,838.90, and of the Medical School \$118,619.18 (after deducting the building

fund of \$160,000), and urging the special need of a Library Fund. The circular in New York was signed by John O. Sargent, Thomas B. Eaton (L. S. 1849-50), William G. Choate (L. S. 1852-54), Addison Brown (L. S. 1853-55), James C. Carter (L. S. 1851-53), Joseph H. Choate (L. S. 1852-54), Charles C. Beaman, Jr. (L. S. 1864-65). In Boston, Professor James B. Thayer and Louis D. Brandeis were chiefly influential in raising the desired funds.(1)

In the Treasurer's Report of Aug. 31, 1883, it appeared that the fund amounted to \$32,021.25, of which \$6,791.25 had been paid in. One remarkable feature of this fund lay in the fact that \$6,641.25 of the amount paid in was given by Henry Villard, of New York, a man who was not a graduate of the College or of the Law School. It later appeared that Mr. Villard had agreed to contribute \$25,000. After he had paid in \$10,000, the financial reverses of the Northern Pacific Railroad, in which he was interested, occurred in 1883-84, obliging him to discontinue his payments. In 1888, however, he wrote to Professor Thayer offering to pay the remaining \$15,000 which was due;(2) and the Library Book Fund finally rose to \$47,021.25 (see Treasurer's Report of Aug. 31, 1907).

The year 1882-83 was not a prosperous one for the School, the number of students falling to 138, the lowest since 1871-72,

In the field of instruction, several changes occurred, the most important being the accession of the new Professor.

Oliver Wendell Holmes, Jr., was born March 8, 1841, at Boston, the son of Rev. Oliver Wendell Holmes, and the grandson of Judge Charles Jackson and of Rev. Abiel Holmes. He graduated from Harvard in 1861. After enlisting in the Fourth Battalion of Infantry in April, he became successively lieutenant, captain and lieutenant-colonel of the 20th Massachusetts Infantry and aide de camp to Major General H. G. Wright of the Sixth Corps. He studied in the Harvard Law School from 1864 to 1866 and

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(1) On Feb. 27, 1882, the following vote appeared on the Corporation Records: "A letter was read from Professor James B. Thayer reporting subscriptions to the amount of \$13,750 towards a fund of which the income shall be used for the purchase of books for the Law School and stating that further subscriptions would doubtless be made.

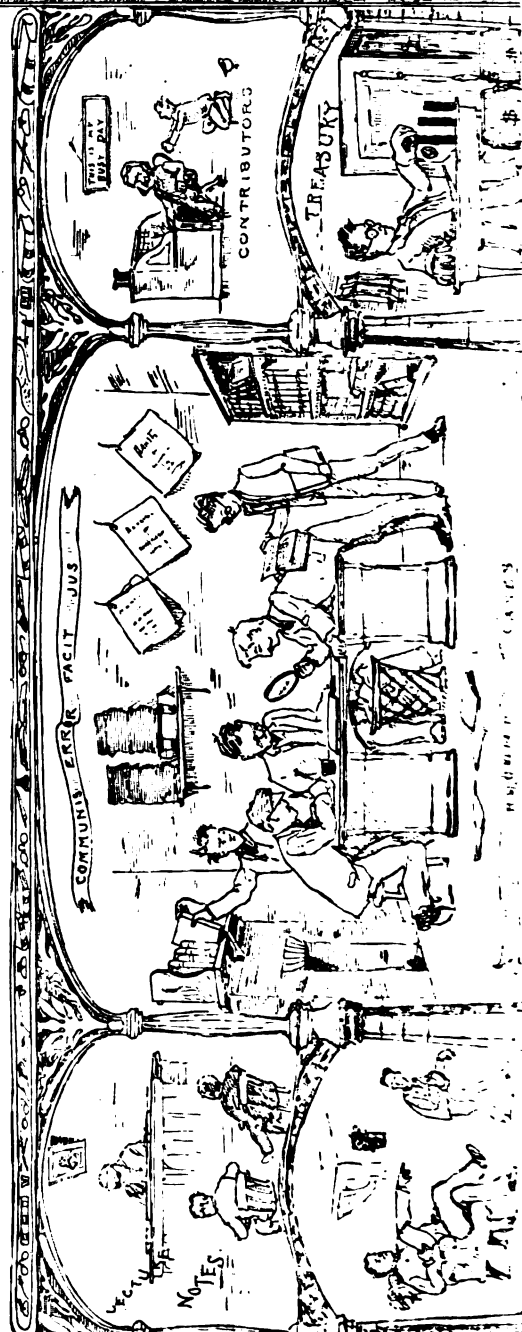
*Voted* to establish a new fund to be called the Law School Book Fund."

The Corporation further extended its thanks to the subscribers for their generously and timely gifts.

(2) See Speech of James B. Thayer at dinner of Harvard Law School Association, June 27, 1888.



# Harvard Law Review



was admitted to the Bar in 1867. In 1873, he became a member of the firm of Shattuck, Holmes and Munroe. In 1870 and 1871, he was a Lecturer in Harvard College on Constitutional Law; in 1871-72 and 1872-73, Lecturer in the Law School on Jurisprudence. In 1873, he edited the 12th Edition of *Kent's Commentaries*, and from 1870 to 1873 was editor of the *American Law Review* (Vols. V, VI and VII). In 1881, he published *The Common Law*. On taking up his Law School duties, he gave a course in First Year Torts, Third Year Suretyship and Mortgages, Third Year Jurisprudence and Third Year Agency and Carriers. Professor Thayer was in Europe on a vacation and three young Instructors took his place: Louis D. Brandeis (L. S. 1875-78, appointed April 10, 1882) who gave a course in Second Year Evidence; Franklin G. Fessenden (L. S. 1870-73, appointed April 10, 1882), who gave a course in First Year Criminal Law and Procedure; and Charles W. Barnes (L. S. 1877-80, appointed October 9, 1870), who gave courses on Second and Third Year Sales; Brooks Adams (L. S. 1871-72, appointed June 21, 1882), who gave a course on Third Year Constitutional Law. A new course on the Law of Persons was given by Professor Gray.

Professor Holmes' career as Professor was cut short by his appointment as a Judge of the Massachusetts Supreme Court, and he resigned his chair, January 8, 1883.

Of his teaching, he has given the following interesting sketch (1):

During the short time that I had the honor of teaching in the School, it fell to me, among other things, to instruct the First Year men in Torts. With some misgivings, I plunged a class of beginners straight into Mr. Ames' collection of cases, and we began to discuss them together in Mr. Langdell's method. The result was better than I even hoped it would be. After a week or two, when the first confusing novelty was over, I found that my class examined the questions proposed, with an accuracy of view which they never could have learned from text books, and which often exceeded that to be found in the text books. I at least, if no one else, gained a good deal from our daily encounters.

After much discussion in the Faculty and the governing Boards

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(1) See Oration at the Law School Day, Nov. 5, 1886, at the Commemoration of the 250th Anniversary of the Founding of Harvard College.

of the University, the vacancy caused by Professor Holmes' resignation was filled, May 14, 1883, by the election of William A. Keener.

Mr. Keener was born in Augusta, Georgia, March 10, 1856, graduated in 1874 at Emory College, Oxford, Georgia, studied at the Harvard Law School 1875-78, and later practised law in New York.

Of this appointment, President Eliot said in his Annual Report for 1882-1883:

From the first, however, he preferred the life of a student and teacher, had embraced all opportunities to teach law, and had given decided promise of success as a teacher. The appointment was of a kind less common in the law schools of the United States than in those of Europe; but its results have already proved satisfactory.

The chief event of the academic year 1883-84 was that recorded in the following vote of the Corporation, October 31, 1883:

*Voted* to make the following entry upon the records of this meeting:

Whereas at the beginning of the current academic year the Harvard Law School moved from Dane Hall to Austin Hall which has been built for the use of the Law School through the munificence of Edward Austin, Esq., upon a valuable site assigned therefore, by the Corporation, the interest of the Law School in Dane Hall has ceased, and the building has been assigned by the Corporation to other uses.

This removal of the Law School in October, 1883, from Dane Hall—its home for fifty years—marked the successful culmination of another of Dean Langdell's designs—the provision of a building appropriate to the increasing prosperity of the School.

As early as 1876-77, President Eliot in his Annual Report had pointed out that the Law School was the least endowed department of the University, and that it was in sore need of a new building.

In his Report of December, 1879, Dean Langdell had described at length the inadequacy and discomforts of old Dane Hall.

Little has been said heretofore, in the annual reports upon the Law School, of the need of a new building. It is not, however, because the inadequacy and unfitness of Dane Hall for the pur-



Austin Hall—Occupied since 1883





poses of the School have not been long severely felt that silence has been kept upon the subject, but rather because it seemed undesirable to excite discontent with what we have, so long as there was no immediate prospect of our being able to get anything better. It is unnecessary to speak of the architectural shortcomings of Dane Hall, for they are so great and so notorious as to be a discredit to the entire University. Regarding it, however, from a purely practical point of view, it has never been a good building. First, its means of ventilation are wholly insufficient for such numbers as have frequented it for several years past. This evil of insufficient ventilation has been much aggravated in the lecture room by the great increase in the number of lectures. For many years after Dane Hall was built there were never more than two lectures in a day; and hence it was not necessary—though it was the practice—to occupy the lecture-room two hours in succession. Now, however, there are almost six lectures a day upon an average; and hence it is necessary, during four days of each week, to occupy the lecture-room four hours in succession each day; namely, from 9 A. M. to 1 P. M. . . . Secondly, the library and lecture-room are each lighted from four different directions; and it would be probably safe to say that a year has never passed in which the cross-lights of these two rooms have not ruined, or seriously injured, the eyes of one or more persons. Thirdly, by reason of its being so low studded and so near the roof, the lecture-room is a very uncomfortable place in warm weather. Fourthly, when Dane Hall was erected its location was as good as could be desired; but since it was moved sixty feet to make room for Matthews Hall, what with the paving of Harvard Square and the great increase of traffic, its location has become one of the worst that could be found in Cambridge. The noise, for example, is so great that it is impossible to make one's self heard in the lecture-room with the windows open; and yet the atmosphere of the room frequently becomes suffocating with the windows closed. . . . The books suffer greatly from the dust, while during the cold weather they suffer greatly from the heat. . . . Again, the danger to the books from fire is so great as to be a cause of constant anxiety. If the library should be destroyed, it is probably safe to say that one hundred thousand dollars would not replace it; and its value is increasing rapidly. . . . Already the Librarian has been compelled to remove large quantities of books from the Library into private rooms. . . . Formerly, each Professor occupied a private room, and it was not the practice of the Professors to do any work in the Library. In this respect, however, there has been a total change. The five Instructors have only two private rooms at their disposal, and even these are so far removed from the Library that they are unavailable for ordinary working purposes. All the work, therefore, done by the Instructors in Dane Hall is now done in the Library; and yet they have no suitable

accommodation whatever. Behind the railing there is space for only one person to work comfortably, and that space is properly occupied by the Librarian's desk. Two Professors can find places to sit, such as they are, but when more than two are present at the same time, some of them must content themselves with standing room; and whether sitting or standing they are a constant inconvenience to the Librarian and his assistants.

The *American Law Review* said in January, 1880 (Vol. XIII) :

Graduates who cannot forget the blasts *ab imo* and the draughts *usque ad coelum* which duly swept through the fee of Dane Hall wish success to the friends of the School, who ask that suitable quarters for books and men be furnished in the new Hastings Hall. Nowhere is work done which is sounder or of more value to the country; and the safety of the Library, as well as the health of the Professors and students, requires that better quarters be built or the present hall be improved as soon as possible.

The Report of the Visiting Committee to the Overseers for 1879-80 stated that the School was suffering from want of income and from the inadequate accommodation afforded by Dane Hall.

President Eliot, in his Annual Report for 1879-80, after recounting the great progress in the School in the past ten years, and calling attention to its lack of endowment<sup>(1)</sup> and to the fact

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(1) In 1871-72, President Eliot had said: "The Law School is very inadequately endowed, and is therefore somewhat dependent for the maintenance of its organization upon the number of students. It is this deplorable dependence which debases so many of the professional schools of this country. With its present organization, the Law School costs from \$25,000 to \$27,000 a year, while it has an income from permanent funds to the amount of only \$11,000 a year, of which sum more than \$8,000 is derived from the Bussey Trust.

To fill out its curriculum the School greatly needs a fourth Professorship to be devoted to Roman Law, Jurisprudence, and the History of Law; but this chair must be amply endowed, for the number of students in this country who know enough to desire thorough instruction in these subjects is small, and is likely to continue so for many years to come."

In 1872-73 he again said: "It is much to be regretted that the Law School is so inadequately endowed, for some steps with regard to legal education still remain to be taken which demand a greater independence of receipts from student's fees than the School can now claim. The Dane Professorship has a fund of only \$15,000, while the present salary of the Professor is \$4,000. The Royall Professorship is still worse off, having a fund of only \$7,943.63. Moreover, it is very desirable that the salaries of the Professors in the Law School should be raised, even if it be not possible to raise the salary attached to a full Professorship in the other departments of the University. Successful lawyers earn much more than \$4,000 a year in these times, even before they reach the prime of life."

In 1876-77, he said: "If the Law School continues to increase in num-

that whatever prosperity it had came from the increase of tuition fees from \$11,525.70, in 1869-70, to \$23,701.24, in 1879-80, continued:

This department of the University has certainly helped itself; it now deserves to be helped. Its building is inadequate in every respect. There is but one lecture room, so that two classes have been this year obliged, at great inconvenience, to resort to lecture rooms which chanced to be temporarily vacant in University Hall; the very valuable Library is exposed to destruction by fire; the situation of the building is such that the lecturers are much disturbed by the noise from the streets; and neither Professors or students can be properly accommodated in the Library. A new building upon a new site is urgently needed.

Within a few weeks after the publication of the above Report, President Eliot received from a gentleman whose name was not at first revealed, the magnificent offer to donate \$100,000 to supply the need of a new building for the Law School.

The Corporation, February 28, 1881, appointed Eliot and John Quincy Adams as a Building Committee, with authority to invite H. H. Richardson to be the architect, and, on March 30, designated Eliot and Treasurer Hooper to select a site—the location finally chosen being on Holmes Place, “very satisfactory as regards aspect and security against dirt, noise and fire.”(1) Plans for the new building were studied with great care; and, the estimate of cost being found larger than the original gift, the offer was increased to \$135,000;(2) and work was begun in the

bers at the rate of the last eight years, and there are no signs of any arrest of progress, the building which it occupies will soon become too small for it. The Library-room is already uncomfortably small for the number of readers who resort to it, and the lecture-room is also insufficient. Some of the smaller rooms in the building can doubtless be used more advantageously than at present; but should the number of students rise much above two hundred, Dane Hall will be entirely inadequate for their proper accommodation. Moreover the very valuable Library of the School ought to be secured in a fire-proof building.”

(1) See Annual Report of the President for 1880-81. Purchase of 33,380 feet of land, known as the Royal Morse Estate, was made which, together with other land owned by the Corporation, afforded sufficient space.

See Vote of the Corporation, April 11, 1881: “Voted to assign for the site of the new building for the Law School the land on Holmes Place now used for a stable together with that just purchased from the representatives of Royal Morse.”

See also Treasurer's Report Aug. 31, 1881.

(2) On April 24, 1882, the Corporation passed the following votes: “The treasurer submitted to the Board an offer from Edward Austin, Esq., to give to the College on or about the first day of July next the sum

spring of 1882. At the same time, public announcement was made that the generous benefactor was Edward Austin of Boston.

Mr. Austin was born at Portsmouth, New Hampshire, January 17, 1802 or 1803, the exact date being uncertain. His family soon removed to Boston. At the age of sixteen, while a boy in the office of a shipping firm, he attracted the notice of one of the leading ship merchants of the day, who offered him the position of supercargo. After several voyages, during which he showed most eminent business ability, he went into partnership with his brother Samuel, in the shipping business. For several years, he lived in Calcutta. On his return to this country, he was made the agent of William Appleton and others to purchase cotton in the South for their mills. He was also agent of Baring Bros.; and so successful were his speculations in cotton for those great bankers that they offered him a partnership, a position which he declined, and which was subsequently accepted by Russell Sturgis (Harv. 1823). After some years, his ship-

of \$135,000 for the erection of a new building for the Law School, in consideration of certain agreements to be entered into by the Corporation in relation to such building—which agreements are stated in the letter of the Treasurer to Mr. Austin, dated April 22nd, and his reply thereto, dated April 24th, 1882, whereupon it was

*Voted* that the President and Fellows gratefully accept the generous offer of Edward Austin, Esq., and agree to carry out the wishes expressed by him substantially as follows:

*1st*, that the Corporation will, as soon as possible before said first day of July, contract at its own risk with Messrs. Norcross Brothers for the entire construction of a building for the Law School in accordance with the plans of Mr. H. H. Richardson which were submitted to be approved by Mr. Austin on April 22nd instant, no modification of the outside of the building is shown upon the plan to be made without Mr. Austin's consent except the substitution of a slated roof for the tiles and terra cotta.

*2nd*, that the changes of plan to be made for the inside of the building to reduce its cost shall not extend to any alteration of the entry ways, so as to remove the polished granite columns or faced brick arches, nor to any alterations of the design for the large reading room, beyond the substitution of plaster for the sheathing between the roof beams, nor shall any change be made which would injure the building for the present uses of a Law School or prevent its ready adaptation to the needs of a growing School for many years to come.

*3rd*, that no building shall be hereafter erected by the College within 60 feet of any part of the Law School building; that being the distance between the front wall of the building and the line of the roadway on Holmes Place.

*Voted* that in remembrance of the munificent gift of Mr. Edward Austin and of his expressed wish that the building shall stand as a memorial of his deceased brother Samuel Austin, the name of Austin Hall shall be given to the new building for the Law School."

On September 26, 1882, at Mr. Austin's request, it voted: "that the President and Fellows will keep Austin Hall permanently in good repair and perfectly insured against fire."

ping business died out; and, abandoning his cotton agencies, he became actively interested as director in Massachusetts railroads and also in the Massachusetts Hospital Life Insurance Co. Gradually, however, he withdrew to the life of a recluse in his library at No. 45 Beacon Street, seldom going out except for a rare visit to State Street or a short daily walk round "His Park" as he called the Common. He died November 16, 1898.(1)

In the latter part of September, 1883, the new building was so far enough advanced that the Library could be moved thither; and lectures began there on October 1, 1883.

"It would be hard to exaggerate the advantages which the School derives from the possession of this admirable building," said President Eliot in the Report for 1883-84. "The reading-room, which is the chief resort of the students, is a noble room, light, airy, and handsomely furnished; the book-room is fire-proof, well-lighted, and capacious enough to hold the present Library and the probable accessions of fifty years; the lecture rooms are well ventilated; the rooms for the Dean and Librarian are ample; and the locker-rooms and other provisions for the convenience and comfort of the students are sufficient for present needs and capable of extension. Internally and externally Austin Hall is very substantially constructed; and it is by far the most ornate building which the University possesses. The architect was Mr. H. H. Richardson, to whom the University owes the design of another much admired building, Sever Hall; and the committee of the Corporation in charge of the undertaking was the Treasurer, Mr. Hooper, to whose good judgment and care in supervising the work the School is much indebted."

The year 1883-84 marked the turning point in the School's financial condition; and from that year, its career became one of increasing prosperity.(2) The number of students was 150, a gain of 12, over the preceding year.

(1) See sketch by W. W. Vaughan in *Harvard Graduate Magazine*, Vol. VII (1899).

(2) President Eliot stated in his Annual Report: "In imposing an admission examination in 1877 and simultaneously raising the full term of residence to three years, the Faculty ran no small pecuniary risk, and the friends of the School have scanned with some anxiety the statistics which annually exhibit in the Dean's report the effects of these very restrictive measures. Within the same period discussions have taken place as to the entire wisdom of the selection of subjects and methods of instruction at the School, and as to the nature of the best possible appointment to professorial chairs. Such debates, however well-conducted and fruitful, do not for the time being encourage the resort of students to the School under

No new Professors or Instructors were appointed this year ; but Professor Thayer, who had returned from Europe, resigned the Royall Professorship, October 8, 1883, to take the chair of the New Professorship, and Professor Gray, on November 12, 1883, resigned as Story Professor, and was appointed to the Royall Professorship. Changes in the courses were few; Professor Keener took Langdell's old course in First Year Contracts, and Ames' course on Second Year Bills and Notes; Ames resumed First Year Torts.

In 1884-85, the number of students connected with the School again showed a slight increase to 156; and instead of a deficit of \$412.86 and \$1,674.46 as in the preceding years, a surplus was shown \$3,176.24. This was especially gratifying, as the expenses of the School in Austin Hall were \$1,500 a year larger than those of Dane Hall.

During the spring of 1886, petitions were sent to the Corporation by large numbers of the Law Students asking that short courses might be given in subjects not then touched on in the School, Admiralty, Bailments, Banking, Conveyancing, Insurance, Jurisprudence, Medical Jurisprudence, Patents, Railroad Law and Mining Law; also for a course on Massachusetts Practice. The Corporation referred these petitions to the Law Faculty, and suggesting the establishment of the last course asked for. The Faculty, after considering the matter at length, took action, April 5, 1886, which was approved by the Corporation in the following vote:

The following answers were received from the Faculty of Law

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discussion, particularly in a country which is over-supplied with schools of law. It is therefore with especial satisfaction that the Faculty have seen the decline in the number of students since 1877-78 reach its limit in five years. The effect of the admission examination has been to increase the proportion of college graduates in the whole number of students, and to improve the quality of the School at the expense of its numbers."

And Langdell stated in his Annual Report: "The great obstacle in the way of the success of the three years' course has been and is, not the difficulty of inducing students to enter the School, but the difficulty of inducing them to remain for three years. During the seven years extending from 1870 to 1876, both inclusive, the average length of attendance of all students entering the School was a trifle over a year and a third (1.35 years). During the seven years extending from 1877 to 1883, both inclusive (being the period during which the three years' course has been in operation), the average length of attendance has been a trifle over a year and a half (1.52 years). . . . It must be confessed, therefore, that the three years' course has not yet produced very much fruit so far as regards the School as a whole."

School in relation to the petitions recently referred to them by the Board.

*"Voted* that it be recommended to the Corporation that the use of a room in Austin Hall be granted to students who desire a course in Massachusetts practice, provided the instructor to be employed by them shall be selected from those who have received the degree of LL. B. cum laude at the School.

*Voted* that the Faculty advise as to the general policy of the School that the efforts of the Governing Boards be directed to the increase of the staff of permanent teachers. As to immediate provision of additional teaching, that they have already added new courses of instruction for the ensuing year to the full extent of the present resources of the School, and that these new courses will deal with some of the subjects mentioned in the petition referred to them."

And it was therefore *Voted* that the answers of the Faculty are satisfactory to the President and Fellows and that the President be requested to ask the Dean of the Law School to communicate the substance of the answers to the students from whom the petitions were received.

In 1885-86, the number of students was 158, about the same as in the preceding year.

The year 1886-87 was one of a sudden increase of prosperity the number of students jumping from 158 to 188.

In the fall of 1886 occurred an event which has since proved of tremendous influence on the success of the School—the formation of the Harvard Law School Association. Its first meeting was held on September 23, 1886, and was adjourned to meet at Austin Hall on Friday, November 5, 1886—the first of the series of days devoted to the Commemoration of the 250th Anniversary of the Founding of Harvard College. At this meeting officers were chosen; an address was given by the new President of the Association, Hon. James C. Carter, of New York, and an oration by Judge Oliver Wendell Holmes, Jr., in Sanders Theatre. Afterwards, a dinner took place in the Hemenway Gymnasium, at which about four hundred were present. President Carter presided, and upon his right sat Judge Holmes, Professor Langdell, Gen. Alexander R. Lawton of Georgia, Hon. George O. Shattuck, Professor Thayer, Hon. E. Rockwood Hoar, Judge Thomas M. Cooley of Michigan, and Professor Ames. On his left were President Eliot, Hon. Samuel E. Sewall, Hon. Robert M. Morse, Jr., Judge Nathaniel Holmes, Hon. Dorman B. Eaton, Hon. Darwin E. Ware, Professor Gray, Professor Keener, and Dr. Man-

dell Creighton of Emanuel College, Cambridge, England. Speeches were made by Carter, Langdell, Sewall (who entered the School in its very first year, 1817, and left in 1819), Eliot, Lawton, Shattuck, Frank W. Hackett, Gray and Hoar (who stated that he had known personally every instructor in law since the very beginning of the School).

It is not surprising that so brilliant an occasion should have been the starting point of a new career of prosperity for the School.<sup>(1)</sup>

Another potent factor in increasing the prosperity of the School arose in this academic year, in the founding of the *Harvard Law Review*, the first legal journal issued in a Law School. The first number appeared April 15, 1887. The Board of Editors were: John Jay McKelvey, Editor in Chief; Joseph H. Beale, Jr., Bertram Ellis, Treasurer; William A. Hayes, Jr., Julian W. Mack, John Wells Morse, John H. Wigmore, Alexander Winkler, Bancroft G. Davis, Marland C. Hobbs, Blewett H. Lee, Henry M. Williams, John M. Merriam, George R. Nutter, Paul C. Ransom.

(1) Of this, Dean Langdell said in his Annual Report (dated Dec. 6, 1886): "It is not clear that it is due to any immediate cause; it is not clear that the crop of the present year is not the fruit of cultivation bestowed during several preceding years. While, however, it cannot be proved to be the effect of any immediate cause or causes, that is not because events have not recently happened of sufficient importance to produce such an effect; for there have been two such events at least. First, during the latter part of 1885-86, the Faculty co-operating with the Corporation voted to increase the amount of instruction in the second and third years from 23 hours per week to 27 hours per week; and also to make all the courses in the second and third years elective. (See vote of March 9, 1886). These changes went into operation at the beginning of the current year; and they were expected to make the second and third years more attractive, partly by convincing the most skeptical that the School furnishes as much work as any man can do and do properly in three years, and partly by enabling every one to obtain all the honors of the School without the necessity of taking any course that may be distasteful to him or that he may think unprofitable. Whether these changes have had the effect of inducing students to remain in the School who would otherwise have left, I do not know. . . .

Secondly, since the close of the year 1885-86 an association has been formed of alumni and former students of the School, called the Harvard Law School Association. The success which has thus far attended this enterprise, whether tested by the alacrity with which solicitations to join the association were responded to, or by the manner in which the newly-formed association celebrated the 250th anniversary of the foundation of the College, has been a surprise to every one. That the association has already rendered a very valuable service to the School there can be no doubt; and if its influence has not already been felt in increasing the number of students in the School, it is doubtless because sufficient time has not yet elapsed to enable it to make itself felt in that way. The gentlemen who conceived and started this enterprise, and who have spared neither time nor labor in carrying it out, are entitled to the lasting gratitude of every one who has the welfare of the School at heart."



In an editorial note, the purposes were stated as follows:

Our subject, primarily, is to set forth the work done in the School with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the *Review* may be serviceable to the profession at large.(1)

Another event of importance was the award by the Academic Council, for the first time, of a fellowship to a Law School student,—the fortunate and able recipient being Julian W. Mack of the graduating class, who was appointed to a Fellowship to study Civil Law, in Europe.

On February 18, 1887, the old system of mock jury trials, in vogue in Judge Story's time, was revived; and a trial was held of Eugene Aram for the murder of Daniel Clark before Beale and Wigmore, J. J. A. Winkler appeared for the prosecution; for the defendant, Eugene Aram (J. W. Mack), appeared pro se. The Clerk of Courts was J. J. McKelvey and the jury was comprised of undergraduates. The *Harvard Law Review* described it as:

A new departure in the line of student law trials which owing to the fact that it bids fair to become a permanent feature of student work is worthy of some comment. The plan embodied the conduct of a complete jury trial from the formal opening of the court to the rendering of the verdict, and in spite of many obstacles has been carried out with remarkable success. As yet no way has been found in which to make the cross-examination a complete success.

The last preceding trial of the kind of which record exists was on May 23, 1871—an action of contract—Godfrey Morse vs. Edward O. Wallcut—tried before Professor Nathaniel Holmes as Judge, Austen G. Fox being Clerk of Court and Archibald M. Howe, Sheriff. James Barr Ames and Henry W. Putman were the counsel for the plaintiff; and G. H. Ball and H. A. Harman for the defendant. The jury was composed of undergraduates.(2)

(1) The "Shingle" given to Editors appearing on the opposite page was drawn by Odin B. Roberts (L. S. 1888-91).

(2) As illustration of the shortness and incompleteness of student memory, a trial occurring in 1894 was described in the *Harvard Graduates Magazine* for March, 1894, as the first mock trial for 40 years. The case was the famous Howland will case—Julian Codman v. B. L. Hand,—and was tried before Professor Jeremiah Smith as Judge.

✓ The School received this year one highly valued gift of \$1,000 for increasing instruction in Constitutional Law during the year 1888-89, presented by the newly formed Harvard Law School Association.

In June, 1888, there was published the first really complete Catalogue of the School ever issued. It was the result of the most careful, discriminating, and laborious pains taken by the Librarian, John H. Arnold. Hitherto a triennial Catalogue had been issued from 1830 to 1851 inclusive. After 1851, only one Catalogue had appeared, (in 1858), until the summer of 1886, when for the use of the coming 250th Anniversary of the College the Catalogue of 1858 was brought down to date, and Mr. Arnold then began the huge work of ascertaining the existing addresses, if alive, and the time and place of death, if dead, of every man who had been in the School.(1)

A vote of the Law Faculty this year, making all courses of the second and third year elective, caused a decided change in the appearance of the Tabular View of courses(2). Several new half courses were given: on Carriers, by Professor Thayer; on Jurisdiction and Practice of the United States Courts, by Professor Gray; on Torts and on Legal History, by Professor Ames; Joseph B. Warner, (L. S., 1871-74, appointed a Lecturer Feb. 18, 1886), gave Third Year Constitutional Law, assisting Professor Thayer. A course of lectures on International Law was also delivered by Henry Warren Torrey, McLean Professor of Ancient and Mod-

The attorneys for the plaintiff were T. N. Perkins and R. S. Barlow; for the defendant, F. R. Bangs and A. N. Hand. Witnesses were A. D. Hill and C. L. Barlow; medical expert, G. K. Bell; Sheriff, D. R. Vail. The jury was out for two hours and found for the plaintiff.

(1) Of this Catalogue, Langdell said in his Annual Report 1888-89: "Until the establishment of the Law School Association the School exhibited a very culpable want of interest in its alumni and former members; and one of the consequences of its establishment has been the very radical change which has taken place in the School in the particular just referred to. In truth, it is only within the last three years that the School has awakened to the fact that its old students are its natural friends and supporters. Moreover, it was not until the fact was made clear to every one by the publication in June, 1888, of the Catalogue of the Officers and Students of the School from 1817 to 1887, that the School fully realized how distinguished a body of men her old students have become, and how much lustre they shed upon their alma mater. Indeed, that Catalogue exhibited a roll of names of which any institution might well be proud. In proportion to its numbers, and the period of time which it covers, it is doubtful if any institution in the United States could produce its equal."

(2) The requirements for the Honor Degree were increased by vote of the Law Faculty of June 7, 1886, requiring thereafter a mark of 75 per cent. to be obtained in the entire course, instead of merely in the studies of the second and third years, by candidate for the Honor Degree.

ern History, Emeritus. The beginning of the year 1887-88 showed that the great increase of students in the preceding year was no sporadic event, but only the forerunner of a permanent phase in the history of the School; for again the membership rose largely, from 188 to 225. The Story Professorship, which had been vacant for five years, was filled by the election of William A. Keener, May 14, 1888; and William Schofield (L. S., 1880-83, appointed Instructor April 25, 1887), gave a course in Torts. Beginning with this year, Langdell adopted his system of giving his third year courses in alternation, in one year Equity Jurisdiction in its relation to Contract, in the next year, in its relation to Torts; in one year, Personal Suretyship, in the next, Real Suretyship or Mortgages.

"The Law School had, in 1888-89, a third year of decided prosperity. Its general condition seems healthy and stable; and since its income has for several years exceeded its outlay, the time is approaching when the teaching staff can be again enlarged, and the number of subjects taught in the School has increased." So said President Eliot in his Annual Report. The number of students was 225, the same as in the preceding year.

Two Lecturers were appointed for this academic year; Herman W. Chaplin (April 9, 1888) on Criminal Law; William Schofield (May 14, 1888) on Torts and Roman Law.

The year 1889-90 marked the twentieth year of Langdell's connection with the School, of which President Eliot spoke in his Annual Report for 1888-89 as follows:

It has been a period full of fundamental changes, serious risks, grave criticisms, and severe anxieties; but the changes have proved wise, the risks have been run without disaster, the criticisms have been met or outgrown, and the anxieties have been forgotten in the crowning success of the last four years. Let any who wish to understand the Dean's grounds of legitimate satisfaction compare the School of 1868-69 with the School of 1888-89 as regards its regulations, courses of instruction, methods of teaching, requirements for admission and graduation, building, library, funds, and general administration. . . . Within the period covered by the Dean's survey, the School has had two great benefactors, the giver of Austin Hall, and the founder of the New Professorship. It has also received from a considerable number of givers a book fund which now amounts to \$42,021.25. These benefactions, however, came rather late in the transformation of the School, and were rewards and encouragements,

rather than originating impulses. It is to the wisdom and courage of the Dean and Faculty, and to the prompt demonstration of the efficacy of the School's methods which its young graduates have supplied, that the School owes its remarkable development. . . .

Heman W. Chaplin and William Schofield were again appointed Instructors for this year, April 29, 1889. In the spring of 1890, several changes occurred. Professor Keener, owing to dissatisfaction with the amount of his salary, resigned March 10, 1890, to accept a Professorship in the Columbia Law School. Of the feelings of the students towards this event the *Harvard Law Review* (Vol. IV.), said in April, 1890:

The students who attended the School during the past seven years will not easily forget his unvarying kindness, his clear and suggestive method of teaching, and the interest and enthusiasm for his subject which he always aroused in his classes. His departure must be felt with regret by all who have the interest of the School at heart, and to this is added a sense of personal loss among those who had hoped to have the benefit of his further instruction.

As the resignation was not to take effect until September, the students petitioned the Corporation, expressing their regret, and the "hope that Professor Keener might be induced to continue in the service of the University." The Corporation voted, however, March 10, 1890, that the Treasurer "be requested to say to the petitioners that no action can now be taken upon their request as the Corporation understands that Professor Keener has already accepted an appointment at another university."

To fill the vacancy in the Story Professorship, the Corporation appointed March 31, 1890, Ex-Judge Jeremiah Smith of Dover, New Hampshire. Of this appointment the *Law Review* said (Vol. IV.), that it "must be a satisfaction to all friends of the Law School. He comes of an old and well known New England family." His father, Jeremiah Smith, was Chief Justice and Governor of New Hampshire in the early part of the Century, and the intimate friend of Fisher Ames, Daniel Webster, and Jeremiah Mason.

Judge Smith was born in 1837, a graduate of Harvard in 1856, of the Law School in 1860-61. In 1867, at the age of thirty, and only six years after leaving the Law School, he was appointed

a justice of the Supreme Court of New Hampshire, which position he resigned, in 1874, to resume practice of the law at Dover, N. H.

The increase in the amount of tuition fees enabled the Corporation to appoint a new Assistant Professor, Samuel Williston, April 28, 1890. Mr. Williston born in Cambridge, September 24, 1861, graduated at Harvard in 1882, and from the Law School in 1888. In that year, he won the Harvard Law School Association prize by an essay on the *History of the Law of Business Corporations before 1800*. (See *Harvard Law Review*, Vol. II.) He also represented his Class at the Commencement exercises. In 1889, he was private secretary to Mr. Justice Gray of the United States Supreme Court, and later practised law in Boston in connection with the firm of Hyde, Dickinson and Howe.

Experience having shown that the existing regulations concerning the admission and continuous registration of special students permitted some persons to maintain a nominal connection with the School who took no part whatever in its work, the Law Faculty checked this evil by adopting new regulations requiring examinations to be passed by special students<sup>(1)</sup> in order to remain in the School.

In 1890-91, Professor Smith began his work as Story Professor, giving First Year Torts, Second Year Agency, and Third Year Corporations and Agency. The new Assistant Professor, Williston, gave First Year Contracts and Civil Procedure at Common Law, and Second and Third Year Bills and Notes.

Professor Ames gave Keener's famous courses on Quasi Contracts, as well as his own former courses on Trusts and Partnership. H. W. Chaplin (appointed March 31, 1890), was Lecturer on Criminal Law; Joseph H. Beale (L. S., 1884-87, appointed April 28, 1890), Lecturer on Damages; William Schofield (ap-

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(1) "Persons who are not candidates for a degree may enter the School as special students at any time without examination, and avail themselves of its advantages in whatever manner and to whatever extent they see fit. They must, however, if not college graduates, produce certificates of good moral character, and give two references for further information.

A special student who has been in the School during any part of any academic year must, in the regular examinations held at the end of the year, or held in the following September, pass an examination in at least three subjects.

No student, whether a candidate for a degree or a special student, who has not in any year passed an examination in at least three subjects will be allowed, unless by vote of the Faculty, to continue as a special student in the School."

pointed June 9, 1890), Instructor in Roman Law. A new course on Peculiarities of Massachusetts Law and Practice was made possible for five years by an anonymous annual gift of \$1,000, coming through Louis D. Brandeis, the Secretary of the Harvard Law School Association; and Frank Brewster (L. S. 1880-83), was appointed as Lecturer, May 12, 1890.

In 1891-92, the extraordinary growth of the School, rising suddenly from 285 to 370, caused Langdell to state in his Report of December, 1891, that Austin Hall, which in 1883 was supposed to be large enough to furnish ample accommodation for all the students who would seek admission to the School during the next fifty years, was already outgrown.<sup>(1)</sup>

Such being the situation to be coped with, the time had now arrived when another step could be taken towards the culmination of the scheme of legal education planned by Eliot and Langdell.

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(1) See Report of the Dean, December, 1891:

"The School is now face to face with a new and very difficult problem. When Austin Hall was erected it was expected to furnish ample accommodation for all the students who would seek admission to the School during the next fifty years. Only eight of those fifty years have now passed; and yet the building is already outgrown. I believe 300 was the number that it was intended to accommodate, and the School now exceeds that number by more than fifty. Under these circumstances, what is to be done? The case is a very peculiar one. If the question were merely one of giving instruction to an increased number of students, a solution of it might be found in the division of the larger classes into sections, though it is believed that a majority of the Faculty would regret the necessity even of such a measure. But the question of giving instruction to so large a number of students as the School is likely very soon to have, does not present the only, nor even the chief difficulty with which we are confronted. Austin Hall is the place where our students do their work as well as receive their instruction; and this is a condition of things which cannot be changed or interfered with without irreparable injury to the School. The reason is that the Library is in Austin Hall and that constant access to that, on the part of every student, is indispensable if the present methods of the School are to be maintained; and yet both the Library and the students' reading-room are already taxed to their utmost capacity."

The *Harvard Law Review* said editorially in December, 1891:

"The astonishing increase in the membership of the Law School this year must be very gratifying not only to the instructors, as evidence of appreciation of their work, but to all who are interested in the School and its methods. The Dean especially must take great satisfaction in the prosperity of the School and in the assured success and firm establishment of the method of instruction to which he has given so much thought and so many years of devoted effort. To be sure, it is not possible to say that the growing confidence in the Langdell method has been the sole cause of the increase of students in the present year; . . . yet such increased confidence, warranted as it is by the success of recent graduates of the School, and spread through the profession, as we are glad to acknowledge, by the influence of the Harvard Law School Association, is believed to be the chief cause of the present numbers."

For years, the ideal towards which they had both been striving was to make the Law School a graduate school in every sense of the word. It was now determined to require an admission examination for all persons who were not college graduates, whether candidates for the degree of LL. B. or not. Up to this time, special students had not been subject to any admission examination, with the result that persons not desiring to be examined entered as specials instead of as candidates for a degree. Moreover, non-graduates who were candidates for a degree had been examined only in Latin or some other foreign language, and in *Blackstone*.

The Law Faculty had taken preliminary action on March 23, 1891, towards changing the situation, when it was voted: "that at the beginning of the academic year 1893-94 and thereafter persons who are not graduates of colleges shall, whether candidates for a degree or not, be admitted to the School only upon passing the admission examinations."

On November 10, 1891, the Law Faculty passed a more detailed vote prescribing the form of examination for all non-college graduates seeking entrance. (1)

The Lecturers during this academic year, 1891-92, were: Frederick P. Fish (appointed April 13, 1891), on Patent Law; Joseph Henry Beale Jr. (appointed May 12, 1891), on Criminal Law and Carriers; Frank Brewster was appointed Nov. 9, 1891, as Instructor on Peculiarities of Massachusetts Law and Practice.

(1) "Voted that: "At the beginning of the academic year 1893-94 and thereafter, all persons who shall not be entitled to enter the School as candidates for a degree without examination will be required, as a condition of being admitted to the School, to pass satisfactory examination on the following subjects:

(I) Latin—Candidates will be required to translate (without the aid of grammar or dictionary) passages selected from the following books: *Caesar's Commentaries on the Gallic War*, Book I-IV, (or Books I-III and *Sallust's Cataline*) and *Cicero's Four Orations against Cataline* and his *Oration for Archias*; and

(II) to translate at sight average passages from *Caesar* and *Cicero's Orations*.

(III) French—Candidates will be required to translate (without the aid of grammar or dictionary) passages from standard French prose authors and also to render passages of easy English prose into French.

The Faculty will at their discretion permit some other modern language to be substituted for French.

(IV) *Blackstone's Commentaries* (exclusive of editors' notes)."

A rule was also adopted by the Law Faculty, requiring candidates for a degree, as well as special students, to pass at the end of their first year in at least three subjects as a condition to remaining in the School.

The year 1892-93 opened with so many students—405—and with so prosperous a condition of the finances—there having been a surplus of \$18,314.14 on Aug. 31, 1892—that it had been found possible to appoint a new Professor; and on April 25, 1892, Eugene Wambaugh had been chosen.

Mr. Wambaugh was born at Brookville, Ohio, Feb. 29, 1856; he graduated from Harvard in 1876 (receiving the degree of A. M. in 1887), and from the Harvard Law School in 1880. From 1880 to 1889, he had been a successful lawyer at the Cincinnati Bar, and from 1889 to 1892, he had been Professor in the State University of Iowa, where he had successfully introduced the Langdell method of instruction.

At the same time a new Assistant Professor was appointed—Joseph Henry Beale Jr., who had already been Instructor in Criminal Law. Mr. Beale was born at Dorchester, Mass., Oct. 12, 1861, graduated from Harvard in 1882, and from the Harvard Law School in 1887, receiving both the degrees of LL. B. and A. M. He taught school at Concord, N. H., for one year, and practiced law in Boston, from 1888 to 1892,

The following Lecturers served during the year—Frank Brewster (appointed April 25, 1892), on Massachusetts Law and Practice; Frederick P. Fish (appointed Sept. 27, 1892), on Patent Law; James Byrne (LL. B. 1882, appointed Sept. 27, 1892), on New York Code Practice.

During the summer, the student's reading room in Austin Hall was enlarged by taking in the space at the east end of the library stack, making 38 more seats—a total of 242.

Owing to the size of the First Year Class—140—as contrasted with 106 in 1890-91 and 90 in 1889-90—it was found necessary to divide it into two sections in Contracts, Property, Torts, and Civil Procedure. "In consequence of this division," said President Eliot in his Annual Report for 1891-92, "the lecture rooms of the School are used more constantly in the morning than is desirable; but the remedy for this condition of things is to use the afternoon hours for lectures to a greater extent than heretofore. It has been the rather luxurious practice of the School, thus far, to use for lectures chiefly the hours from nine to one. It may hereafter be necessary to use the afternoon hours freely, as other departments of the University are accustomed to do."

The courses were divided among the Professors as follows: Wambaugh and Williston took Contracts; Gray and Beale took



Property; Smith gave his course in Torts in two sections; Wambaugh and Williston gave Civil Procedure. At the end of the year, "the method did not find favor," said President Eliot, "and it has been abandoned in all subjects except Torts."

The most notable feature of the year was the final adoption of the Case Book System by Professor Thayer—the last of the older Professors to issue a book of cases. His *Cases on Evidence* was published in the summer of 1892—"the need has long been felt"—said the *Harvard Law Review* (Vol. V).(1)

The publication also of Professor Gray's sixth volume of *Cases on Property* was noted by the *Harvard Law Review* as, "thus completing a series which in its comprehensiveness, judicious arrangement and selection and general adequacy for the purpose of instruction under the case system is susceptible of little improvement. The members of this School have indeed cause for gratitude to Professor Gray, who, at the expense of an untold amount of labor, thought, and time has so materially lightened the work and the difficulties of those who have had the privilege of studying under his guidance."

November 25, 1892, the Law Faculty passed a still further restrictive vote, which practically abolished all distinction between special students and regular candidates for a degree.(2)

In the spring, the Law Faculty voted, March 31, 1893, to place the graduates of certain law schools in the same category as college graduates, so far as to exempt them from the necessity of admission examinations—although, if they desired the degree of LL. B. from the School, they must still pass such examination.(3)

(1) In the preface to his book, Professor Thayer said: "I have been driven to the preparation of this book by the necessities of my classes at the Harvard Law School. With the growth of the School it is no longer possible to rely merely on our Library. . . . It furnishes a text book for that careful preliminary study which should prepare all who are to take part in the regular conferences between an instructor and his pupils. My experience confirms that of others, who have found, in dealing with our system of law, that the best preparation for these exercises is got from the study of well selected cases."

(2) Up to this time, even under the latest rules, if a student passed the first year examinations he could remain in the School as long as he liked without further test. Now it was voted that:

"No student whether candidate for a degree or a special student who fails to pass an examination annually in at least three subjects will be allowed unless by vote of the Faculty to continue in the School. Examinations in first year subjects may be taken at the end of the year or in the following September."

(3) "Voted: That the degree of Bachelor of Laws, if obtained at a law School in which the regular course of study is not shorter than two

There was still ever before the Faculty, the great ideal of making the School a purely graduate school. As Professor Ames said in the *Harvard Graduate Magazine*, in January, 1893:

It seems not unreasonable to hope that the Law Faculty may soon see its way to admit as candidates for the degree in Law only those who have already taken the preliminary degree in Arts or Science, or give satisfactory evidence of equivalent mental training. Then the Law School, like the Divinity School and the Graduate School, will be placed upon a true University basis.

Such a step the Faculty took by vote of April 18, 1893. (1)

Under the above vote, four classes of students were eligible for degrees, after the year 1895-96:

(a) Holders of academic degrees from certain specified colleges.

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academic years of seven months each, will secure admission without examination in Latin, French and *Blackstone*. Persons thus admitted will be classed either as special students or as candidates for a degree at their option; but until they pass examinations in Latin, French and *Blackstone*, they cannot receive the degree of Bachelor of Laws from this University."

(1) President Eliot in his Annual Report for 1892-93 thus stated the vote and its design:

"It was voted that, after the academic year 1895-96, no persons shall be admitted without examination as candidates for the Law degree, except Bachelors of Arts, Literature, Philosophy, or Science, at some one of 106 institutions named, and persons qualified to enter the Senior Class of Harvard College. They had already enacted in the previous year that special students must pass a satisfactory examination in Latin, French, and *Blackstone's Commentaries*, unless they hold an academic degree from some institution not enumerated in the list just mentioned, or from a law school which confers the degree of law only after an examination upon a two years' course of at least seven months each. They further decided that special students who after passing the admission examination shall reside three years at the School, and pass in due course the requisite legal examinations, may receive the degree of LL.B., if they at any time during the course entitle themselves to enrollment as regular students, or if they attain a mark within five per cent. of that required for the degree *cum laude*. After the year 1895-96, therefore, the members of the regular classes in the Law School must all have obtained before they entered the Law School a respectable degree in Arts, Literature, Philosophy, or Science; but persons who have entered the School as special students may nevertheless obtain the degree by passing the legal examinations with distinction on the whole course of three years. Although 106 institutions were named in the preliminary list of institutions whose graduates would be admitted to the Law School without examination as candidates for a degree, it was not supposed that the list was complete, and it will doubtless be enlarged from time to time. The Law Faculty in taking this action gives effective support to what may be called the primary academic degrees in the United States, that is, to the degrees of Bachelor of Arts, Literature, Philosophy, and Science; and it is the first law school in the country to give that support to colleges and scientific schools."

(b) Men qualified to enter the Senior Class of Harvard College.

(c) Special students who resided three years and passed all examinations, including admission.

(d) Special students who received on the full three years' course an average within 5 per cent. of the honor mark.

There were three classes eligible for admission as special students:

(e) Holders of academic degrees from colleges not specified in the list.

(f) Graduates of law schools having a certain prescribed course.

(g) Men who passed a satisfactory admission examination.

In 1893-94, the number of students dropped from 405 to 367. (1)

One further restrictive measure was voted by the Law Faculty November 6, 1893:

*Voted:* That after the academic year 1894-95, admission to the second year shall be limited to students who have been members of another law school for at least one academic year of not less than seven months.

This action was taken to prevent undergraduates from combining their college work with the first year Law School course, a combination deemed detrimental alike to the student and to the School," said Professor Ames.

The discontinuance of the experiment of dividing the first year classes into sections enabled the Faculty to arrange for three new half courses. Wambaugh gave a course on Insurance—a subject in which he had large experience both in teaching and practice before he became Professor at the School; Beale gave a course on Damages for the first time, though several series of lectures on the general subject had been given by him in 1891-92 and 1892-93 and by others in previous years.

"It is believed," said the *Harvard Law Review* (Vol. VII), "that this is the first attempt in America to treat the Law of

(1) This was largely the effect of the new requirement of an admission examination for all non-college graduates, whether candidates for the LL. B. degree or special students. There was a great decrease in special students—from 76 to 23. The unusual loss however was more that made up by the gain in the quality of the students; for the percentage of college graduates rose to 77 per cent.—an increase of 7 per cent. over the preceding year.

Damages thoroughly and scientifically." Beale also gave a course on Conflict of Laws, the last course on that subject having been given by Keener, six years previously. The course on the New York Code Practice was given by Ernest L. Conant (LL. B. 1889, appointed in place of James Byrne, who was appointed May 29, 1893, but did not serve). The course on Massachusetts Law and Practice was again given by Frank Brewster (appointed May 29, 1893). The course on Patent Law announced to be given by Frederick P. Fish (appointed May 29, 1893) was unavoidably postponed.

The year 1894-95 showed a considerable gain of students—to 413. "The greatest matter for congratulation," said the *Harvard Law Review* (Vol. VIII); "is probably to be found in the increased number of other colleges which send their graduates thither—50 this year as against about 30 last year."

Ernest L. Conant was appointed Instructor in Law September 25, 1894; and Frank Brewster, Instructor in Massachusetts Law and Practice, April 2, 1894. A new course on the Law of Persons was given by Professor Smith. A new half course on Contracts was given by Williston; and Ames, assisted by Beale, resumed his half course in Legal History, which had been discontinued for many years; Wambaugh's course on Insurance was made a full course.

In June, 1895, Langdell having served as Dean of the Law School for twenty-five years, "with great honor to himself and the School," said President Eliot, resigned his position; and on June 18, 1895, James Barr Ames, who had been in the service of the School twenty-two years, was chosen Langdell's successor as Dean; and the Corporation voted that it desired to record its sense "of the extraordinary educational and financial success which has attended Professor Langdell's labors as Dean and Professor, and to express the hope that the labors of his coming years may be as fruitful to the School and the legal profession, as those of the past twenty-five years have been."

Langdell's associates in the Law Faculty, James B. Thayer, Jeremiah Smith, John C. Gray, James B. Ames, Eugene Wambaugh, Samuel Williston and Joseph H. Beale, Jr., together with Mr. Justice Oliver Wendell Holmes, a former colleague, wishing to commemorate this 25th Anniversary, published, in the *Harvard Law Review* for April 25, 1895 (Vol. IX, No. 1), the number being most willingly surrendered by the editors for this purpose,



**Austin Hall—View of Corridor, First Floor**



a collection of original legal essays, the whole bearing this dedication: "To C. C. Langdell, in honor of his genius as a lawyer, his originality as a teacher of law, his sagacity as a law-school administrator, and his devoted and successful services as Dean and Professor during the last twenty-five years."

On June 23, 1895, came the remarkable tribute to Langdell by the Harvard Law School Association, the Ninth Annual Meeting and Dinner being held "in especial honor of Christopher Columbus Langdell," of which President Eliot said in his Annual Report:

The former members of the School assembled in large numbers, and the whole occasion was a worthy commemoration of Professor Langdell's great services to the School and the profession.

Professor Langdell's administration has been remarkable for four things: first, for the invention and adoption of a new method of teaching Law; second, for the adoption of a new mode of training teachers of Law; third, for a great, though gradual elevation of the standard of the degree in Law; and fourth, for success in regard to number of students, increase of endowment, improvement of equipment, and income from tuition-fees.

## CHAPTER XLV.

### LANGDELL AS A TEACHER.

Of Professor Langdell's personality as a teacher, many graphic and discriminating accounts were written after his death<sup>(1)</sup>. "He was gentle in his address to the point of diffidence. The impression that his personality left upon his students was of a distant, lofty spirit in aloof communion in another world with voiceless kindred spirits—and curiously contrasted with the dogmatic vigor of his written thoughts." So wrote one of his pupils.<sup>(2)</sup>

Professor Ames said: "While it was a liberal education to follow the working of his mind in the class room, close attention and hard thinking were demanded of those who would keep up with his compact reasoning. His teaching was pre-eminently fitted for the cleverest men in the School." And in his life of Langdell in *Great American Lawyers*, Ames mentions among his prominent characteristics—his cheerfulness, his painstaking, his passion for truth, his exactness and his conservatism.

Professor Beale (L. S. 1884-87) wrote of his student days under Langdell<sup>(3)</sup>:

When we entered his lecture room, we were struck by the massive intelligence of his brow. We admired his severe and almost impassive face, and we seemed to find the quiet, intellectual atmosphere of the cloister. In our time, as a result of his failing sight, he never used the Socratic method in his teaching. He simply talked, slowly and quietly, stating, explaining, enforcing and re-enforcing the principles which he found in the case under discussion. Our note books read like his articles on Equity Jurisprudence; quiet, forceful, full of thought, and requiring close study to follow them. Only now and then, when some subtle point was raised by Judge Mack or Professor Williston, (not then Judge or Professor), his face would light up, and he would think aloud, to the vast delight of those members of his class who could

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(1) See articles by Professor Eugene Wambaugh, Professor Jeremiah Smith, Professor Joseph H. Beale Jr., Professor James Barr Ames, and Austen G. Fox in *Harvard Law Review*, Vol. XX (November, 1906).

(2) C. C. Langdell, by R. W. Gloag (L. S. 1890-93) in *Albany Law Journal*, Vol. LXVIII (1906).

(3) *Harvard Law Review*, Vol. XX (Nov., 1906).



follow him. Those were halcyon days. And once in a great while, something would amuse him, and he would throw back his head with a laugh that seemed to have the full strength of his mind in it.

It was largely owing to Mr. Langdell's manner in class, and to his careful fullness of statement and of discussion that his law sometimes seemed too academic; and many of his students said if they did not really feel, that his teaching was magnificent but it was not law. He was quoted as speaking of "a comparatively recent case decided by Lord Hardwicke," and he was believed to regard modern decisions as beneath his notice. In the subjects of Equity and Suretyship, which he was then teaching, one might have fancied from his list of cases that Lord Eldon was still on the woolsack and that America was legally undiscovered. . . . His list of cases on Specific Performance of Contracts held out the fond hope that we should get as near to the present as the case of *Lumley v. Wagner*; but there was only time in the last lecture for a hurried but scathing criticism of that decision. His manner of treating the subjects he taught was unimpassioned and coldly logical, and his intellectual deliberation seemed mediaeval.

The quietness of his teaching, however, was the quietness of intensive force, and the antique seeming of his law was all on the surface. We found that we were carrying away his ideas in our heads as well as in our note books, and that those ideas really represented the law of the present time.

Austen G. Fox (L. S. 1870-71) wrote:

Langdell—How fond we were of you, our great teacher, our wise and patient friend! . . . We were drawn to you at first by no display of learning—for you were ever incorrigibly modest,—but by your simple, unaffected friendliness when we sought your aid, you filled us with faith in yourself and with courage to tread the true path, no matter what the effort. So close was our friendship and so personal your leadership, that we are inclined to wonder, whether, after all, the question is not so much what we study as with whom we study.

The best and most elaborate account of Langdell, however, is that written by William Schofield (L. S. 1880-83), who was for some years an Instructor in Torts and Criminal Law in the School, now Judge of the Superior Court in Massachusetts.(1)

I first saw him as a teacher in the fall of 1880, at the opening of the Harvard Law School, in the course on Contracts. He was then fifty-four years of age and seemed to be in his physical and

(1) *Christopher Columbus Langdell*, by W. Schofield in *Amer. Law Register*, Vol. XLVI, N. S. (1906).

mental prime. He was of middle height, somewhat stout in build. His head was large and well formed and firmly set upon his shoulders. His hair was dark, with no trace of baldness, and he wore a full beard. Neither his hair nor his beard had begun to turn gray. His forehead was large and square, and suggested logical power. His eyes were brown, but not especially noticeable except for the fact that they looked at you from behind old-fashioned spectacles with a keen but kindly glance. His voice was low and mild. Sallust in describing Catiline takes note of his uneven walk (*citus modo, modo tardus*). Professor Langdell's step was regular, but heavy and slow. There was no suggestion in it of nervousness, or of turning backward. His whole aspect was that of a modest, learned, but strong and kindly man.

He ascended the platform on the second floor of the old Dane Hall, and opened the course with a brief statement of the nature of a contract. Then he called upon some student to state the case of *Payne v. Cave*, the first case in his collection of cases. . . . After the case had been stated, a discussion followed of the point decided. This fairly broke the ice, and the students soon learned what was expected of them under the Langdell System.

The mental characteristics of Professor Langdell were displayed prominently from the start. His dominant purpose seemed to be to bring out not only the decision of each case, but the reason for the decision. Students soon learned that any position they might advance was pretty soon to be followed by the question, "Could you suggest a reason?" This came with such frequent iteration that it was something of a by-word. To this day the question "Could you suggest a reason," will probably produce a smile among old pupils of Professor Langdell.

Another point upon which he laid stress was the correct use of terms. We were constantly speaking of "offer," "acceptance," "consent," "consideration." Occasionally Professor Langdell would rap impatiently upon the desk and say, "Gentlemen, I should like a little more precision in the use of terms." He was thoroughly fair and impartial in the discussions. If a student in explanation of a case made a point that was unusually good, Professor Langdell would remember it, and sometimes give credit to the student afterwards by name when he mentioned it,—a distinction of great importance in the Law School world.

It can hardly be said that Professor Langdell was a popular instructor. If compared with Judge Story in this particular he would suffer much. Professor Langdell was always intent upon the matter in hand, and nothing could divert him from it. Judge Story on the other hand, overflowing with good nature, and gifted with a marvelous memory, stored with knowledge which he loved to communicate, was often led away from the subject of his lecture and was bountiful in giving compliments to the young men. If a student answered correctly a question which suggested the answer, the Judge would say, "You are right; Lord

Mansfield himself could not have answered more correctly." To the serious mind of Professor Langdell this would seem like trifling. With him the reasoning powers were constantly in use to the neglect of the other faculties. Although he had collected a number of volumes of cases, he never displayed any facility in recalling their names or in remembering the points decided in them or the facts. He seemed to take up each case in the class as if he had never seen it before. He went over all the steps in the reasoning as new work without any aid from or reliance upon memory. His method was a daily object lesson to students in thoroughness and accuracy. Under his guidance discussions which would otherwise have been listless and unprofitable became stimulating and fruitful. His students soon began to feel that they were not only acquiring knowledge but developing new powers.

In conducting his reasoning processes he was very hospitable to suggestions, but independent in his conclusions. The greatest names compelled no allegiance from him, unless their opinions were based upon sound reasons. In the first weeks of the term, when the class was engaged upon the subject of contract by letter, involved in the case of *Adams v. Lindsell*, a student showed Professor Langdell a passage in Guthrie's translation of *Savigny's Conflict of Laws*, which seemed to bear on the point. Mr. Langdell took the book, read the passage carefully, and then said, "That's not up to Savigny's reputation." He held the book, however, as I recollect the matter, for further examination.

Professor Langdell was always willing to reconsider a conclusion in the light of new suggestions. Not infrequently in new courses with which he had not become thoroughly familiar, he would recant propositions which he had advanced as sound. A student recently informed me of a course in which Professor Langdell changed his opinion in regard to a case three times in the course of one week, each time advancing with positiveness a new doctrine. That he could do this without losing the respect or confidence of his students shows the esteem in which he was held. They well knew that he was a teacher of originality and great industry, with no object but to discover and state truly the principles of the law. To lose confidence in him for changing his position upon a legal proposition would be as absurd as to lose confidence in Charles Darwin if he withdrew a tentative conclusion found to be false after more extended investigation. Professor Langdell studied the law as contained in the reports in the same spirit in which the great scientists study the phenomena of nature.

It must not be inferred, however, from the emphasis here given to Professor Langdell's logical tendencies that he was wholly given up to reasoning. He was a man of deep and strong feelings. He relished the vigorous expressions sometimes found in the reports, such as "blowing hot and cold." In referring to Sir

Ralph Bovy's Case, where the plaintiff put into a declaration an averment which should have been held back for a replication, he quoted Lord Hale's expression, "It is like leaping before one comes to the stile," with a twinkle of merriment which showed that he was unmistakably pleased. It should be mentioned too that he was interested in the welfare and success of the students. Many acts of kindness to individuals might be mentioned, and at the end of the course he was always glad to learn that any of the young men had found a good opening in an office or elsewhere.

Professor Langdell's sight was somewhat defective as early as 1880. This defect increased with advancing age, and as it increased he gradually changed his method of instruction. He finally abandoned the Socratic method and stated and analyzed the cases himself. He occasionally did this in dealing with complicated cases long before he adopted it as a practice. For example, the case of *Lancaster v. Evors* in his course on Equity Pleading was thus considered. On such occasions Professor Langdell's students were treated to unrivalled exhibitions of analytical power. Everything pertaining to the case was laid bare, and all collateral and allied topics were fully discussed. This method of teaching by the Langdell System has advantages over the Socratic method. It enables the instructor to expound the whole case, even though it may involve principles drawn from widely different titles of the law, and review all the work of the judge. On the other hand, in a course conducted by oral discussion in which the students take part it is practically necessary to limit the consideration of each case to the point which is the subject of the particular course. When Professor Langdell adopted the method of personal exposition of cases, which was his sole method in his later years, he wrote his lectures. His teaching in the class room then exhibited mainly those characteristics which appear in all his written works. . . .

He had a high regard for logical symmetry, but he recognized that the Common Law is made or declared by the courts, and he took the principles which he used as his premises from the books of reports. He vigorously insisted that the logical inference from correct premises was the rule of law. This fidelity to logical inference made him conservative, and an enemy to exceptions and innovations. It was this characteristic, as I conceive, which made him unwilling to accept the doctrine of the majority of the court in *Lumley v. Gye*, although he did not expressly reject it. But this conservatism was accompanied with practical good sense, and if the courts took a step which he deemed unsound in principle, he would content himself with pointing out the error and the consequences of it without asserting that the law should be changed. . .

The reason, with him, was the vital question, and he has frequently pointed out the evil consequences resulting from wrong reasons, though given as the basis for right decisions.

His conservatism is best shown in those parts of the law which

invite originality, especially in equity. In his view, equity is a science of remedies, and he never indulged in mere theories or original notions of something supposed to be natural justice. . . .

This conservatism of Professor Langdell is a striking fact, far more noteworthy in a teacher of law than it be in a judge. Judges are surrounded with safeguards which tend to make them conservative. A teacher of law is protected against empty theorizing only by the depth and soundness of his own mind.

Of his contributions to the development of legal science, the following summary has been made by Professor Ames(1) :

In his analysis of contracts, he emphasized the distinction between unilateral and bilateral contracts ; and these terms, which, essential as they are to correct legal thinking, were hardly to be found in any of our law books, a generation ago, are now thoroughly domiciled in our legal terminology.

There was another distinct advance in the law of Contracts, when he made detriment incurred by the promisee at the request of the promisor, the universal test of a consideration. Sir Frederick Pollock in an appreciative review of the *Brief Survey* refers to the distinction established by the author between bills for an account proper and bills based upon an "equitable assumpsit" as "a brilliant example of Professor Langdell's method." Hardly less brilliant is his statement that the so-called doctrine of specific performance of contracts is a misnomer in the case of affirmative contracts, since Equity in such cases enforces not the specific performance of the contract, but specific reparation for its breach. No one who wishes to wrestle with the fundamental conceptions of law can afford to overlook Langdell's classification of rights and wrongs, or fail to profit greatly by his substitution of the terms absolute and relative rights for rights *in rem* and rights *in personam*.

To the legal expert, the *Summary of Equity Pleading*, the only one of his treatises that covers its subject, is the best exhibition of the author's great powers of historic insight, acute analysis, original sagacious generalization, and vigorous terse expression. His derivation of the system of Equity Pleading from the ecclesiastical system, with borrowings from the Common Law practice, is as convincing as it is fascinating, and, read in connection with the English cases upon Equity Pleading, demonstrates the practical importance of a knowledge of legal history by those who are administering the law. Had the English Equity judges of the 17th and 18th Centuries been familiar with the historical development of Equity Pleading, as described by Langdell, suitors would have been saved from a mass of costly litiga-

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(1) Reprinted from Professor Ames' Study of Christopher Columbus Langdell in *Great American Lawyers*, by courtesy of The John C. Winston Co., Philadelphia.

tion, and the reports would not have been encumbered with what must be considered the least creditable judgments in the history of English Equity. The part of this classical treatise which is likely to have the most far-reaching influence is the chapter dealing with the nature of Equity Jurisdiction. It is an ancient maxim that equity acts *in personam*, but to Langdell belongs the credit of emphasizing, as no other writer has emphasized, the importance of this maxim, and of asserting that the power of the Chancellor, as representative of the Sovereign, to compel the defendant to do what he ought to do and refrain from doing what he ought not to do, is the key to the whole system of Equity. This conception has dominated all his writing and teaching of Equity.

Of the great work of his life in conceiving and putting into successful operation a new theory and system of legal education and of its widespread influence, description is given in other chapters of this book. In the words of Professor Ames again<sup>(1)</sup>: "After explaining his theory of legal education in the preface to his *Cases on Contracts*, Langdell never wrote a word in its behalf. His triumph was won solely by the influence of his teaching upon his pupils and by the impression made by them in the practice of their profession. His influence, already dominant, promises to be enduring."<sup>(2)</sup>

(1) See *Howard Graduates Magazine*, Vol. XV (Dec. 1906).

(2) Langdell's books and legal articles were as follows:

His *Select Cases on Contracts* appeared in instalments during 1870-71, the completed volume being published in October 1871, with a summary of thirteen pages. In May, 1872, he published his *Select Cases on Sales of Personal Property* with a summary of twenty pages. In 1875, he published his *Cases on Equity Pleading* (which had been printed in instalments since 1873), with a summary of one hundred and twenty pages. In 1877, this summary was published separately. In 1879, his second edition of *Cases on Contracts* appeared with a much amplified summary. In 1880, this summary appeared as a separate book (second edition in 1883). In 1879, he published the first three parts of *Cases on Equity Jurisdiction*; and in 1883, two further parts. No summary was ever made of this incomplete collection, and he abandoned its use, in 1890. In 1905, the *Harvard Law Review* obtained his consent to publish in a volume various essays which had appeared in that magazine, entitled *A Brief Survey of Equity Jurisdiction*.

In addition to the above, Langdell wrote for the *Harvard Law Review* the following articles:

*Equitable Conversion*, Vol. XVIII, p. 245; Vol. XIX pp. 79, 233, 321 (1905-6). *Discovery under the Judicature Acts of 1873-1875*, Vol. XI, pp. 137; 205, Vol. XII, p. 151 (1897-98). *Mutual Promises as a Consideration for Each Other*, Vol. XIV, p. 496 (1901). *Patent Rights and Copyrights*, Vol. XII, p. 553 (1899). *The Status of Our New Territories*, Vol. XII, p. 365 (1899). *The Northern Securities Cases and the Sherman Anti-Trust Act*, Vol. XVI, p. 539 (1903). *The Northern Securities Case Under A New Aspect*, Vol. XVII, p. 41 (1903). *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation or the absence of it During that period*, Vol. XIX, p. 151 (1906).

## CHAPTER XLVI.

### THE AMES PERIOD.

The first year under Dean Ames witnessed a sudden increase in students, from 413 to 475, this year (1895-96) being the last before the new admission requirements were to go into effect. The Professors were forced to make many shifts in the programme of courses, owing to Langdell's being relieved of one-third of his duties, and the ill-health of Williston. Langdell's course on Suretyship and Mortgages was taken by Ames, who also took Williston's course on Bills and Notes, and First Year Contracts until February, when it was assumed by George Rublee (LL.B. 1895), who was appointed as Instructor March 23, 1896. Beale took First Year Civil Procedure and also gave a course on International Law, and other minor changes were made. Ernest L. Conant was again appointed Instructor in Law, Sept. 30, 1895; and Francis C. Huntingdon (LL.B. 1891) was appointed Lecturer on the New York Code, March 23, 1896.

The year 1896-97 was the first year of the new requirements for admission. Notwithstanding the fact that, as stated by Dean Ames in his Report for 1894-95, "when the prospective policy of restriction was adopted in 1893, it was believed that in the first year of its operation the number of students would fall below 400"—the number actually rose to 490—the largest ever in the School. (1)

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(1) In the spring and fall of 1896 and 1897, the Law Faculty passed several votes, with the intent to raise still higher the standard of the School and to add to the significance of the degree—the first vote (February 20, 1896) increasing the passing mark on admission examinations from 50 per cent. to 60 per cent.; the next vote (May 13, 1897): "that all candidates for the degree entering the School after May 1, 1897, who do not take advanced standing be required to spend three years in resident study, and that the privilege of being absent from the School during the second or third year be granted only in rare instances and upon cogent reasons presented to the Faculty."

Another vote was passed, May 17, 1897, that, after June, 1898, third year students who were candidates for the ordinary degree, as well as those who were candidates for the honor degree, should be required to take ten hours a week, and that no one should be admitted to the third year if there was more than one condition against him in first or second year work; and still another on Oct. 8, 1897 "that no student be permitted to continue in the School who does not pass annually examinations in work representing

Owing to the continued illness of Williston, Ames took charge of Contracts and Bills and Notes; and Beale took Pleading.

Frank Beverly Williams (L.L.B. 1895, appointed May 11, 1896) served as Instructor in Partnership; and Francis C. Huntingdon (LL.B. 1891, appointed May 11, 1896) served as Lecturer in Pleading and Practice under the New York Code of Civil Procedure. The course on Suretyship was dropped.

It is to be noted that the Faculties of the various departments of the University, had for some years been growing more and more self-governing and independent. The Corporation accordingly passed the following vote which was considered at a meeting of the Law Faculty, May 17, 1897:

Resolved that in the opinion of this Board, the Faculties should communicate to the Governing Boards, notice of any very material changes proposed in the constitution of the several Schools, or in the conditions of admission, before taking final action.

For some years, the Courts of the student law clubs had been detracting from the interest shown in the Moot Courts; and it was now determined by the Faculty to discontinue them, the last Moot Court being held March 10, 1897.

In 1897-98, Dean Ames said in his Report: "The continued growth of the School, notwithstanding its change into a graduate department of the University, has upset all our calculations. . . . The unprecedented number of entries this year makes it probable that the School will not have fewer than 500 students for some years to come; for it seems impracticable effectually to check the resort to the School by further restrictive measures."  
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at least six hours a week through the year"; and a further vote, Nov. 17, 1897, raising the pass mark in examinations from 50 per cent. to 55 per cent.

(1) In the *Harvard Graduates Magazine*, Vol. VI (Dec. 1897), Dean Ames said:

"When it was decided to admit as candidates for a degree, after the year 1895-96, only college graduates or persons qualified to enter the Senior Class of Harvard College, it was with the general expectation that the change would involve a serious diminution in the attendance at the School. Several members of the Faculty believed that the loss would be but temporary, as it had been twenty years before, when the course was extended from two years to three. But no one was so rash as to suggest that the succession of annual gains in members which had continued unbroken since 1883 would be maintained during the two years after so radical a departure as the conversion of the School into a graduate depart-





**Austin Hall—View of North Lecture Room, First Floor**



Two things seemed imperative; an addition to the teaching staff so that in all the subjects of the first year and in the large electives of the second year, the classes might be divided into sections; and a still further enlargement of Austin Hall both for reading room and lecture room.

In this academic year, Assistant Professor Beale assumed the duties of Bussey Professor, having been appointed to that position April 14, 1897, and Frank B. Williams succeeded him as Assistant Professor. Ezra R. Thayer, (LL.B. 1891, appointed May 24, 1897) served as Instructor on Peculiarities of Massachusetts Law and Practice; and Charles B. Barnes (LL.B. 1893, appointed Sept. 28, 1897), as Instructor on Suretyship; a course on Roman Law by Assistant Professor Williams was added and he also gave Bills and Notes. Owing to the continued illness of Williston, Ames had charge of Contracts, and Beale, of Pleading.

February 24, 1898, the Faculty adopted a resolution that, "it is for the true interests of the law students to complete their Law School course before attempting to pass the examinations for admission to practice." This vote illustrated how far the School has gone beyond the old conditions which prevailed from 1830 to 1870, when it was a very usual practice for men to enter the School for the first time after being admitted to the Bar, such admission being considered equivalent to a certain amount of residence in the School, in the award of the degree of LL.B.

On April 1, 1898, the Faculty passed a vote to cover a gap in the regulations as to the rights of graduates or students of other Law Schools desiring to enter.

*Voted:* that persons who have spent an academic year of not less than 30 weeks in regular attendance at another law school and have passed creditable examinations there in the work of the year, if otherwise qualified to enter the School as regular students, may register as special students, and take both first and second year examinations, at the end of their first year's residence in this School.

The year 1898 was memorable in the Nation for the declaration of war with Spain. Many of the students in the Law School,

ment of the University. But the unexpected happened. There was a falling off in 1896-97, it is true, in the number of new entries, but the total number of students exceeded by ten that of the preceding year: in 1897-98, the new entries alone exceeded those in any one year in the School's history, and the advance of 65 in the total registration had been exceeded only once."

enlisted in the military and naval services of the United States; and to meet this condition of affairs, votes were passed by the Law Faculty on May 12, 1898. (1)

The financial prosperity of the School may be judged, from the following vote of the Corporation, May 9, 1898, constituting a separate Library Fund:

*Voted:* on the advice of the Law Faculty, to use the sum of \$100,000, to be taken from the Law School balance as of July 31, 1898, for the establishment of a Law School Library Fund, the income of which shall until further order of the Corporation be applied towards the administration expenses of the Law Library.

The Law School balance on August 1, 1897, had been \$140,486.93, and on July 31, 1898, after deduction of this \$100,000, was \$70,111.27.

Joseph Doddridge Brannan was elected Professor on June 15, 1898, Mr. Brannan was born in Circleville, O., January 6, 1848; graduated from Harvard in 1869, and attended the Law School 1871-72. He taught German in the College 1871-72, and Roman Law in the College 1872-73. He practiced law in Cincinnati, where at the time of his appointment he was a successful Professor in the Law School of the University of Cincinnati (founded in 1896). On May 23, 1898, the Corporation after many years of difficult search for a man qualified to meet the desires of the founder, filled the Bemis Professorship by the appointment of Edward Henry Strobel. (2) Mr. Strobel was born in Charleston,

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(1) *Voted:* That the Dean be authorized to allow students of the first or second year who lose the coming June examinations, because of entering the military or naval service, to take those examinations in a subsequent year.

*Voted:* That third year students who have already entered the military or naval service and are thereby prevented from attending the coming June examinations and who have complete records for two full years, be recommended for the degree, and for that form of the degree to which they would severally be entitled on the records of the first two years.

It was also voted that the third year men, having conditions might be recommended for a degree on their first and second year work, whenever they should make up such conditions.

(2) On September 4, 1892, Miss Bemis, the annuitant to whom the income of the Bemis Professorship fund had been paid since 1878, died. "The fund," said President Eliot, "amounts to \$50,845.23 and will not yield therefore much more than half of the salary paid to senior Professors in the Law School. It was the wish of Mr. George Bemis, the founder, that the incumbent of his Professorship should be a jurist who had been in public life or the diplomatic service, or who, at least, had lived abroad and so had had opportunity to view his country from without. He also wished

South Carolina, December 7, 1855. A Harvard graduate of 1877, he attended the Law School in 1877-78, 1879-80, and 1882, receiving his degree of LL.B. in the latter year. He was admitted to the Bar in New York. During the presidential campaign of 1884, a document which he prepared incisively disclosing the weak points in Mr. Blaine's diplomatic record brought him such reputation, that after President Cleveland took office he soon appointed Strobel Secretary of Legation at Madrid. At this post, owing to the illness of the Minister, Strobel was *Chargé d'affaires* for a third of his five years' residence. He was retained in his position by Mr. Blaine when Secretary of State; and in 1888, he was sent to Tangier to settle matters at issue with the Moroccan Government. He resigned as Secretary of Legation in 1890. He was appointed third Assistant Secretary of State under Mr. Gresham in President Cleveland's second administration. In April, 1894, he was appointed Minister to Ecuador, and December, 1894, was promoted to be Minister to Chili, at a critical time when relations were strained between the countries. This office he resigned in February, 1897. In July, 1897, he was named by the French and Chilean governments to arbitrate the claim of a French citizen. (1)

The year 1898-99 was chiefly noticeable for the large increase in the teaching force, due partly to the earnest recommendation to that effect in the report of the Visiting Committee to the Overseers, the preceding year. Besides the two new Professors before mentioned, the following Lecturers were appointed—Arthur C. Rounds, (LL.B. 1890, appointed Dec. 12, 1898), on Pleading and Practice under the New York Code; James J. Storrow (LL.B. 1888, appointed Dec. 27, 1898), on Patents; Henry W. Swift (LL.B. 1874, appointed June 28, 1898), on Sales. The following Instructors were appointed: Robert G. Dodge (LL.B. 1897, appointed December 12, 1898), who conducted Second Year Property; Jens Iverson Westengard (LL.B. 1898, appointed March 28, 1898), who gave First Year Pleading and shared First Year Criminal Law with Professor Beale. Professor Williston returned and gave a new course on Bankruptcy. Beale resumed his course on Damages (omitted the preceding year). The new Professor,

the incumbent to be not merely a professor of the science, but a practical co-operator in the work of advancing knowledge and good-will among nations and governments. It will obviously be difficult to fill this chair."

(1) Strobel died Jan. 15, 1908. See excellent sketch of his life by Lindsay Swift in *Harvard Graduates Magazines*, Vol. XVI (March, 1908).

Brannan, began his duties and gave courses on Second and Third Year Bills and Notes and Third Year Partnership. The new Bemis Professor, Strobel, gave a Third Year course on "International Law as administered by the Courts." Assistant Professor Williams, owing to ill health, was compelled to resign, September 1, 1898, much to the regret of his associates, the students and the Corporation; and his course on Roman Law was omitted.

A brilliant series of lectures were given during the year by the noted English jurist, Professor Albert Venn Dicey on *Changes in the English Law during the Nineteenth Century*. He was appointed by the Corporation as a Lecturer on October 10, 1898, being the second foreigner to receive this distinction,—the first being Count Gurowski, who delivered lectures on Civil Law in 1850-51.

Two important changes in methods of study were introduced, both in pursuance of the recommendations of the Visiting Committee of the preceding year.

The first was the division of the classes in Pleading, First Year Property, Bills and Notes, and Evidence, into two sections, and Criminal Law into four. These classes had become altogether too unwieldy in number and impracticable to teach satisfactorily by the Langdell methods. They numbered respectively 226, 227, 115, 186, and 229. (1)

The second was the continuance of Bail Courts which were started in 1897-98 to give practice in pleading.

In 1899-1900, the School again greatly increased in size, having 49 more students than in 1898-99—a total of 613; and Dean Ames said: "the increase in the new entries makes it improbable that the number of students will fall below 600 for some years to come. . . . It is an interesting fact that the number of graduates in the School, this year, from Yale, Dartmouth and Brown, 114, exceeds by one the total number of students in the School at the corresponding time of the year 1872-73."

President Eliot said in his Annual Report (2):

The serious questions about the Law School arise from its

(1) The increase in the size of the School the next year, 1899-1900 necessitated further division of classes into sections—First Year Property (having 244 students), Second Year Property (188), Torts (241), Contracts (238), Bills and Notes (65), and Evidence (184), were divided into two sections; Pleading (234) into three sections; and Criminal Law (231) into four sections.

(2) See Annual Report for 1898-99, referring to the fall of 1899.

prosperity and success. It has more than four times the number of students it had fifteen years ago; and its Library is growing, and threatens to continue to grow, at the rate of more than 6,000 volumes a year. An immediate enlargement of the building is imperatively demanded; and in planning that enlargement it seems to be necessary to look forward to a Law Library of more than 100,000 volumes within ten years. Financially, the School is able to provide both the building and the books; but it would be really formidable to imagine the future size and costliness of this department of the University, if it were reasonable to suppose that its recent rate of increase would be maintained.

There were fewer lecturers appointed for this academic year. Ezra R. Thayer, (appointed May 15, 1899) gave the course on Massachusetts Law and Practice; Harry A. Bigelow, (LL.B. 1899) was appointed Instructor in Criminal Law, May 15, 1899; Jens Iverson Westengard, then Instructor in Criminal Law, was appointed Assistant Professor, March 13, 1899. Charles F. D. Belden (LL.B. 1898) was appointed Secretary of the Law Faculty Sept. 1, 1899, (confirmed by the Corporation Oct. 2, 1899).

The following changes of courses were made by the Professors: Williston, after an interval of three years resumed his course on First Year Contracts; Ames gave Second Year Sales; Westengard, Second Year Property, as well as First Year Pleading; Brannan gave a Second Year course in Bankruptcy; and Williston, a Third Year course on the same subject.

A matter which had come up early in the Langdell régime was again acted upon adversely by the Corporation, at the beginning of the academic year—the admission of women to the Law School course. In June, 1899, a woman petitioned for admission as a regular student; but the Law Faculty felt that so radical a change would require, practically as well as theoretically, the sanction of the Corporation and Overseers. It did, however, adopt, June 24, 1899, a vote which gave a graduate student at Radcliffe College the same privileges as to law studies that she already enjoyed in regard to subjects taught in the Graduate School. (1)

(1) "Voted: That the petition of Frances A. Keay, a graduate of Bryn Mawr College, to be admitted as a regular student of the Law School in October, 1899, be not granted; but that the Dean be authorized to inform her that if the Governing Boards of Radcliffe College admit her as a graduate student with a view to her attending this School, she may take the courses and examinations, but, not being a registered member of the School, will not receive the Harvard degree of LL.B."

October 16, 1899, however, the Corporation passed the following vote, and sent it to the Overseers, who took no action:

*Voted:* That the President and Fellows are not prepared to admit women to the instruction of the Law School on the plan suggested in the vote of the Faculty of the Law School of June 24, 1899, and the vote of the Council of Radcliffe College of June 26, 1899.

November 13, 1899, the Law Faculty voted not to admit thereafter as candidates for a degree, "persons qualified to enter the Senior Class of Harvard College"; and, April 9, 1900, they restricted further the admission of special students.

At the end of this academic year, 1899-1900, a question, which for some years had been troubling the Law Faculty, was settled—the admission of Harvard Seniors to the School.<sup>(2)</sup>

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(1) "*Voted:* That the paragraphs permitting special students to entitle themselves to enrollment as regular students, either by becoming qualified to enter with the Senior Class of Harvard College, or by receiving a degree from a college in the list of selected colleges be omitted from the 1900-01 Law School Circular.

Persons who have never received a degree, but who have attained the age of 21 years, will in rare instances be admitted as special students by special vote of the Faculty and upon passing in September satisfactory examinations in *Blackstone*, Latin and French."

A further raise of the standard of the School may be noted in the vote of the Law Faculty Nov. 12, 1900, providing that students must pass in four subjects at the end of the first year or in four full courses or their equivalents at the end of the second and third years in order to continue in the School or to rejoin it; except that a person seeking to rejoin might do so upon obtaining a general average at some regular examination on the entire work of the year in which he failed, at least 5 per cent. higher than the usual passing mark.

(2) In his Report for 1896-97, Dean Ames said, referring to the fall of 1897:

"These Harvard Seniors are fewer by eight than in the year 1896-97. This is a welcome decrease. Any discussion of the general principle of permitting a college student to complete the four years' course in three years would be out of place in this report. But attention may fairly be called to the practice of granting leave of absence, during their senior year, to students who have completed sixteen and one-half of the eighteen courses required for the degree of A.B.; for under this practice Seniors on furlough registered in the Law School are obliged to divide their time between their College and their Law School work. As might be anticipated, these Seniors have not made a good record in the Law School. . . . It would be for the true interest of the men, as well as for the good of the Law School, if the practice of granting furloughs should be discontinued except in the case of Seniors who have completed their eighteen courses."

In 1897-98, the Dean said:

"The registration of 30 Seniors in the Law School indicates how rapidly the conviction is spreading that a young man should be able in some mode to complete the College course and the Law School course in six years. The reasonableness of this conviction, so long as the average age of admission to the College stands at 19, is obvious. But neither of the two



On June 27, 1900, the Law Faculty voted, "that the Dean be authorized to notify Harvard College students that they cannot count upon the continuance after 1899-1900 of the present practice which permits Seniors on leave of absence to combine the first year work with arrears of College work." This vote, as the Dean said, represented the opinion of the Law Faculty that a law student should give the whole of his study hours to his law work. Experience had shown that a majority of those who combined Law and College studies made poor records in both departments.

The chief event of the year 1900-01 was the resignation of Langdell as Dane Professor, October 9, 1900, and his appointment by the Corporation as Dane Professor of Law Emeritus.

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methods of accomplishing the desired result that have been tried thus far, has stood the test of experience.

For some years prior to 1893 it was the common practice of College students who wished, as the phrase went, to save a year, to attend during their Senior and Junior years, the first-year courses of the Law School and to take, in the September following their graduation, the examinations for advanced standing in the Law School. The Law School record of College students, who in this manner anticipated the first year of their law work, was so poor as to convince the Law Faculty that it was for the interest of the student and of the School to remove the opportunity for this anticipation. Accordingly in 1893 the privilege of taking advanced standing in the School was abolished except for persons who had been in regular attendance for an academic year at some other law school.

In consequence of this change a new mode of saving a year was introduced. The Faculty of Arts and Sciences, yielding to the pressure of their students, began the practice of granting leave of absence during the senior year to those who had crowded at least five-eighths of the work of that year into the preceding three years."

This practice, the Dean pointed out, had proved a failure:

"If the leave of absence should be granted to all who had fully completed three years' work in college and who desired to enter one of the professional schools of the University, and if the Seniors on furlough should be required to pass satisfactory examinations in all of the first-year work of the professional school in which they registered, as a condition of receiving the degree of A.B. with their College class, the dignity of that degree would certainly not be lowered, and the desired object of saving a year would be accomplished. The Law Faculty would welcome the adoption of this plan."

In 1898-99, the Dean said:

"The law examinations of last June demonstrated once more what had been proved in each of the five years preceding, namely, that the law work of Harvard Seniors, who had not completed their College work, was inferior not only to that of Harvard graduates, but also to that of the School at large. Fortunately this deplorable experience will not be repeated after June, 1900, for by a recent vote of the Law Faculty the rule admitting as regular students persons qualified to enter the Senior Class of Harvard College was abolished."

See vote of Law Faculty, Nov. 13, 1899, that:

"Persons qualified to enter the Senior Class of Harvard College be no longer admitted to the Law School without examination as candidates for the degree of Bachelor of Laws."

The Corporation further voted that "they desired to put on record their appreciation of his unique services:"

He has been Professor of Law for thirty years, a term of service much longer than the Law School enjoyed from any of his predecessors; he was the first Dean of the Law School, and was Dean for twenty-five years during a period of fundamental reconstruction; he originated a method of teaching law which has proved to be a radical improvement of great value and wide application; finally he has taught law by voice and pen with profound learning, great accuracy and clearness of statement, and complete devotion to the work of teaching. The Corporation recognize Professor Langdell's contributions to the welfare of the Law School and to the improvement of legal education as sound in theory and effective in practice, and as likely to be of lasting influence for good, not only in Harvard University, but in all Universities which prepare young men for the learned professions.

And they further recognized Langdell's services by arranging for him an exceptional retiring allowance, and inviting him "to continue to avail himself of all the facilities in Austin Hall which, as Professor and Dean, he has of late years enjoyed."

To his remarkable career of success, Dean Ames in his Annual Report for 1899-1900 paid the following tribute

After a service in the cause of legal education unrivalled in the past, and not likely to be matched in the future, Professor Langdell retires from the Law Faculty. When he came to Cambridge thirty years ago, he entered a faculty of three Professors giving ten lectures a week in a School of 115 students and conferring the degree after one year of residence upon persons "admitted to the School without any evidence of *academic* requirements and sent from it without any evidence of *legal* requirements." He leaves a Faculty of ten Professors, seven of them his former pupils, giving more than fifty lectures a week to over 600 students and bestowing the degree upon college graduates after three years of residence and the passing of three annual examinations. In 1870, the Treasurer's books disclosed a deficit. In 1900, the surplus is large enough to build an extension of Austin Hall greater than the original building and is about to be so applied. He found here the wreck of a library. He leaves a library without a peer among the law libraries of the world.

Of these changes Professor Langdell was not *magna* but *maxima pars*. The most fruitful change of all, however, has been the revolution effected by him in the matter of teaching and studying law, a revolution that has spread and is spreading so rapidly to other schools that in a few years his views may be

expected to dominate legal education throughout the United States.

Professor Langdell has richly earned the right of dignified contemplative repose with the satisfaction of watching the progress of this School along the lines marked out by himself, and the growing influence of his ideas in other schools. It is, however, a great pleasure to his colleagues to know that he is to retain his room in Austin Hall and that he will add to his services to the School and to the legal profession by devoting to writing the hours he formerly gave to teaching.

Several new teachers served during the year. Bruce Wyman (LL.B. 1900, appointed Lecturer, April 30, 1900) gave a wholly new half course on Administrative Law. William R. Peabody (LL.B. 1898, appointed Instructor, May 14, 1900), assisted Beale in Criminal Law. Robert Gray Dodge (LL.B. 1897, appointed Instructor, May 14, 1900), assisted Williston in Contracts. Arthur C. Rounds (LL.B. 1890, appointed Lecturer, May 14, 1900) gave the course on New York Code Practice. Strobel gave a new half course on the Civil Law of Spain and the Spanish Colonies; and after a lapse of many years, a half course on Admiralty was given by Ames; Williston resumed Sales; and Brannan gave Damages. In consequence of Langdell's retirement, Second Year Equity was omitted; and Third Year Equity was given by Ames.

Owing to the size of the School (655) and of the separate classes, all the first and second year courses were now divided into sections.

The policy of the School as to instruction was thus stated by President Eliot in his Annual Report.

The Faculty of the Law School is in favor of limiting the instruction given in that School to law determined by courts. They therefore would not admit to the School such studies as institutional history, government, political science, and administration national, state, municipal, or colonial. The demand for instruction in these subjects at universities is manifestly increasing; but since the Law School is indisposed to take them up, they will have to be developed in the Graduate School.

February, 1901, the School took part in the celebration, general throughout the country, to commemorate the 100th anniversary of the appointment of John Marshall to be Chief Justice of the United States. Lectures were suspended for this day, and in the afternoon Professor James B. Thayer delivered an address

in Sanders Theatre, before the members of the School and invited guests.

In 1901-02, the number of students dropped to 633—a loss of 22. President Eliot in his Annual Report pointed out that the number of colleges represented by graduates in the Law School was 92, as contrasted with 25, thirty years ago.

The following men were appointed Instructors for the academic year: William R. Peabody (LL.B. 1898, May 13, 1901), on Criminal Law; Joseph L. Stackpole Jr. (LL.B. 1898, July 12, 1901), on Patent Law; Bruce Wyman was re-appointed Lecturer on Suretyship and Mortgage, May 13, 1901; and Ezra R. Thayer, Lecturer on Massachusetts Law and Practice, May 13, 1901.

Many minor changes in courses were made necessary by the assumption of Langdell's work by Ames, who gave the two courses in Equity Jurisdiction; Strobel gave a course on Admiralty.

The chief and saddest event of the year was the sudden death of Professor James Bradley Thayer on February 14, 1902, at the age of seventy-one.

No better description of Professor Thayer can be given than in the words of his colleagues at the School, in their tributes, published in the *Harvard Law Review* (Vol. XV), in April, 1902.

Professor Williston said:

The two most striking characteristics of his teaching were the charming personal courtesy felt in all his discussions with his class, and the painstaking accuracy which he exhibited himself, and without which no student, however brilliant, could satisfy him. Every teacher of large classes must consciously or unconsciously adjust his main efforts to the minds of a portion of his students. The brilliant, the mediocre, and the dull cannot always get nourishment from the same food. It was to the better men in his classes that Professor Thayer's teaching was chiefly addressed. His desire seemed rather to fathom the depths of the subject before him than by evading difficulties and exceptions to present the simpler outlines of the law in such fashion that the dull and the slow could comprehend them. He was infinitely patient with the poorly gifted, but he did not let the limits of their comprehension define the boundaries of the work in his courses.

. . . I have always thought his analysis of a case more exact and complete than that of anyone else I ever knew. . . . His originality lay chiefly in the depth of his historical research, the accuracy of his restatement of the law, and the logical acumen

with which he traced the consequences of a recognized principle.

Few indeed can have attended his lectures without learning more than the legal doctrines which were the direct objects of their study. Something, at least, of the accurate and careful habits of mind, the patience in wearisome investigation, the absolute intellectual sincerity, the never-failing kindness and courtesy which distinguished the teacher, must have borne fruit in the minds and hearts of the pupils.

Professor Ames said:

During the early years of his service, he lectured on a variety of legal topics, but Evidence and Constitutional Law were especially congenial to him, and in the end he devoted himself exclusively to these two subjects, in each of which he had prepared for the use of his classes an excellent Collection of Cases. Evidence was an admirable field for his powers of historical research and analytical judgment. He recognized that our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England. The results of his work appeared in his *Preliminary Treatise on the Law of Evidence*, a worthy companion of the masterly *Origin of the Jury*, by the distinguished German, Professor Brunner. His book gave him an immediate reputation, not only in this country, but in England, as a legal historian and jurist of the first rank. An eminent English lawyer, in reviewing it, described it as "a book which goes to the root of the subject more thoroughly than any other text-book in existence." . . . Although he has published no treatise upon Constitutional Law, he has achieved by his essays, by his Collection of Cases, and by his teaching, a reputation in that subject hardly second to his rank in Evidence. To the few who knew of it, President McKinley's wish to make Professor Thayer a member of the present Philippine Commission seemed a natural and most fitting recognition of his eminence as a constitutional lawyer, and, if he had deemed it wise to accept the position offered to him, no one can doubt that the appointment would have commanded universal approval.<sup>(1)</sup>

Wherever the Harvard Law School is known, he has been recognized for many years as one of its chief ornaments. When, in 1900, the Association of American Law Schools was formed, it was taken for granted by all the delegates that Professor Thayer was to be its first president. No one can measure his great influence upon the thousands of his pupils. While at the School, they had a profound respect for his character and ability, and they realized that they were sitting at the feet of a master of his subjects. In their after life, his precept and example have

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(1) Professor Thayer also drafted a Constitution and Code for Dakota which was adopted with slight amendment.

been, and will continue to be, a constant stimulus to genuine, thorough, and finished work, and a constant safeguard against hasty generalization or dogmatic assertion. His quick sympathy, his unfailing readiness to assist the learner, out of the class-room as well as in it, and his attractive personality, gave him an exceptionally strong hold upon the affections of the young men. Their attitude towards him is well expressed in a letter that came to me this morning from a recent graduate of the School, who describes him as "one of the best known, best liked, and strongest of the Law Professors."

Professor Smith said:

The work by which Professor Thayer will be best known to the next generation of lawyers is his *Preliminary Treatise on Evidence at the Common Law*. What is the impression which that book would make upon a legal reader who is an entire stranger to the author?

One of the first impressions would relate to the character of the writer. The reader will undoubtedly say that the man who stands behind this book must have been a person of singular modesty and remarkable candor. Here is a man who puts forward original ideas and important views without flourish of trumpets or claiming the merit of discovery; a man who never overstates the case in support of his own theories, and is always careful to give full space and due weight to the argument opposed to his own views. Every page bears evidence of the quality which Martineau calls "intellectual conscientiousness."

But the competent lawyer who reads this book in the next generation will not stop with the conclusion that it was the work of an honest man. He will say that it proceeds from an intellect which is both profound and patient. He will praise not only the substance, but also the arrangement of the topics. Every brick in the edifice is laid in its proper place, and every brick was carefully rung before it was laid. There was first a careful investigation of authorities; and then a re-examination of the subject as if it were a new matter.

Professor Thayer goes straight to the fundamentals of the topic. He does not content himself with repeating stereotyped formulas, nor is he satisfied with half solutions of difficulties. On the contrary, he gets behind the ordinary explanations. He does not fall into the mistake, alluded to by Fitzjames Stephen, of supposing that the rules of evidence "had an existence of their own apart from the will of those who made them." Instead, he takes us back to the very birth of these rules, and shows when, why, and how each of them came to be. Nothing can exceed his thoroughness in this respect.

But why did we have from Professor Thayer only a Preliminary Treatise? Why did he spend his strength on that, instead of

at once putting forth a practical treatise on the Law of Evidence as now administered by the courts? The answer is to be found in the Introduction to the published work; and it marks both the honesty and the thoroughness of the man. Many years ago he began to write a practical treatise; but after he had made a beginning, he found the need of going largely into the history of the subject, and also of making a critical study of certain related topics which overlaid and perplex the main subject. He went into those examinations, he spent an immense amount of time upon them; and these tasks occupied all the spare moments of his remaining years. The results are gathered in the published volume,—a work of infinite value, which, if he had shrunk from undertaking it, would not have been achieved at all during the present generation. Why was not more work completed in all these years and given to the world; why were not his wider plans of book-making fully carried out? To these questions more than one answer can be given. First: Professor Thayer had an absolute horror of what some once calls "immature authorship and premature publication." We may well apply to him some of the words which Stuart Mill uses in reference to John Austin: "He had so high a standard of what ought to be done, so exaggerated a sense of deficiencies in his own performances," that he accomplished less in the way of authorship than he seemed capable of; "but what he did produce is held in the very highest estimation by the most competent judges."(1)

In the spring and summer of 1902, plans and estimates were made for a large addition to Austin Hall, but the cost of the proposed building was so high that the Corporation and the Law Faculty agreed to a postponement.(2) The fact that in 1902-03 the number of students showed only a moderate increase of 11, to 644, encouraged the authorities to wait still longer before building, although the Law Library had so far outgrown Austin Hall that 20,000 volumes were shelved in the Annex to Lawrence Hall.

A large number of changes was made in the teaching force.

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(1) For further accounts of Professor Thayer's life and works, see: *Publications of the Colonial Society of Massachusetts*, (1902); *James Bradley Thayer*, by C. S. Haight, *Columbia Law Review*, Vol. II; John Chipman Gray in *Harvard Law Review*, Vol. XV.

(2) During the summer of 1896, extensive alterations were made in Austen Hall, the library stack being extended into the roof, thus gaining two stories, a small lecture room being constructed in place of a store room, and electric lights being introduced into the stack. The sum of \$21,030.76 was spent for this purpose—"a cause for regret," said the Dean in his Report, "that it should be for no better purpose than an extensive enlargement of the building; but it is a slight consolation that the School would be following a precedent in its own history—the enlargement of Dane Hall in the time of Judge Story."

Edward B. Adams (LL.B. 1897, appointed Lecturer, May 26, 1902) assisted Professor Westengard and Mr. Wyman in Professor Gray's courses on Property. Charles J. Hughes Jr. of Denver, Colorado, (appointed Lecturer, Sept. 23, 1902), gave a new course on Mining Law. Rufus W. Sprague (LL.B. 1900, appointed Lecturer, Jan. 12, 1903) gave the course on New York Code Practice, taking the place of Arthur C. Rounds, who was appointed Lecturer for 1902-1903, May 12, 1902, and resigned Jan. 12, 1903; William R. Peabody was re-appointed Lecturer on Criminal Law, May 12, 1902; Bruce Wyman was appointed Lecturer on Suretyship and Mortgage, March 31, 1902, and Lecturer on Property, Carriers and Conflict of Laws, May 12, 1902, and on April 13, 1903, he was appointed Assistant Professor.

January 26, 1903, Ames was elected Dane Professor and transferred from the Bussey Professorship. On May 26, 1903, Eugene Wambaugh was elected Langdell Professor; Joseph Henry Beale was elected Bussey Professor; and Samuel Williston was elected Weld Professor—all confirmed by the Board of Overseers, June 24, 1903.

September 26, 1902, Charles F. D. Belden was appointed Assistant Librarian and Frederic L. Fischer Secretary of the Law Faculty.

President Eliot in his Annual Report for 1901-02 noted one marked feature of the academic year 1902-03:

At the request of the University of Chicago and of Professor Beale, the Corporation gave Professor Beale leave of absence during half of the academic year 1902-03, and the whole of the academic year 1903-04, in order that he might organize and develop during its first two years, a law school in the University of Chicago similar to the Harvard Law School in methods and aims. This original and instructive method of establishing a new law school is now being successfully carried out. It is a striking instance of effective coöperation by two universities. The older university thus puts all its experience in carrying on a law school at the service of the younger university, and lends a valued professor to serve as organizer and temporary administrator of the new school. It is evident that the common commercial motives have not governed this transaction.

Owing to the death of Thayer, the ill health of Strobel and the absence of Beale during the first half year, a considerable re-arrangement of courses was made necessary. Thayer's courses on Evidence and Constitutional Law were assumed by Gray;



Westengard and Mr. Adams and Mr. Wyman gave Gray's Property Courses; and Mr. Wyman gave Conflict of Laws with Professor Beale and a course on Carriers.

In 1903-04, the number in the School rose suddenly and alarmingly from 644 to 743, and Austin Hall had now become absolutely inadequate.<sup>(1)</sup>

The noted feature of the year was the departure of Professor Strobel, and, later, Assistant Professor Westengard, to Siam, they having received the unusual honor of an invitation to become Legal Advisers to the King of Siam. The Corporation appreciating the compliment to the Law School, implied by this invitation, readily granted them furloughs for two years.

April 13, 1903, William R. Peabody was appointed Lecturer on Criminal Law; and Ezra R. Thayer, on Massachusetts Law and Practice; on June 8, 1903, Wallace Brett Donham (LL.B. 1901) was appointed Lecturer in Equity, and Frederic Green, of Providence, R. I. (LL.B. 1893, son of the former Lecturer, Nicholas

(1) Dean Ames in his Annual Report for 1903-04 said:

"The book-stack in Austin Hall has room for 60,000 volumes, or less than three-quarters of our 83,000 books. 23,000 volumes are shelved in the annex of Lawrence Hall, to the inconvenience of the reader and at the disquieting risk of the destruction of the books. Furthermore, the Library is growing at the rate of more than 5,000 volumes a year. The lecture rooms are too few. The reading room, having only 240 seats, is suited to the needs of a school of not more than 400 students, or about three-fifths of those now in the School. There are only seven Professors' rooms for eleven Professors. The administration room is overcrowded, and there is no cataloguing room. In a word, the School has completely outgrown Austin Hall.

The inadequacy of the stack, the lecture rooms and Professors' rooms, and of the administration and cataloguing accommodations, however inconvenient, may be endured for a time without serious detriment to the students. But the insufficient accommodations of the reading room are a serious menace to the effectiveness of the School.

When the students numbered 400 or less, a large majority of them did the greater part of their work in Austin Hall. They were always sure of finding a seat at a table, and in very many cases, by the operation of a sort of Common Law of their own, the same seat throughout the year. Being within easy reach of all the books they formed the habit of consulting freely the authorities, and gained a familiarity with the reports and treatises not to be obtained in any other way.

To-day the students, as a rule, do the greater part of their work in their own rooms. Many would prefer to work in Austin Hall, but the small seating accommodation makes it impossible to count upon obtaining a place at a table, and many students abandon the attempt to get one. In the opinion of all the members of the Law Faculty a return to the former practice of making the reading room the chief place of work of the students is imperatively demanded, if the School is to maintain its high standard of efficiency. Steps should be taken at once to enlarge Austin Hall, or, if that is impracticable, to build a new home for the School, and in the new building the reading room or rooms should have the capacity of seating at one time at least two-thirds of the students, and admit of expansion with the growth of the School."

St. John Green), Lecturer on Admiralty.

Robert Bowie Anderson was appointed Assistant Librarian November 23, 1903.

The absence of Westengard, and Beale, made some re-arrangement of courses necessary. Wambaugh took First Year Property and discontinued Quasi Contracts; Mr. Donham gave Third Year Equity; Wyman shared First Year Contracts with Williston; Gray resumed Third Year Property; Wyman gave a new course on Administration of Law by Public Officers.

In 1904-05, the number of students increased by 23, to 766. Edward Henry Warren (LL.B. 1900) was appointed Assistant Professor, February 8, 1904, and gave courses on Corporations, Second Year Equity, and Second Year Property with Beale; Westengard was re-appointed Assistant Professor, June 20, 1904. Samuel Hudson Hollis (LL.B. 1901) was appointed Lecturer on Insurance, Oct. 10, 1904; Clarence Harmon Olson (LL.B. 1904), Lecturer on Admiralty; Rufus W. Sprague (LL.B. 1900, appointed May 1, 1905), Lecturer on New York Code Practice. Wambaugh took Gray's course on Constitutional Law; Wyman gave Carriers, Suretyship, and six lectures on "International Relations—Special Topics in the Law of Peace and War;" Ames resumed Third Year Equity and First Year Pleading.

The distinctive feature of this year was the appointment of James C. Carter, of New York, a student in the Law School 1851-53, to give a series of lectures on the *Origin, Growth and Function of Law*. No happier compliment was ever paid to anyone than the remarks, addressed to this leader of the New York Bar, nine years previously, by Joseph H. Choate, at the dinner of the Harvard Law School Association, June 25, 1895:

I regard it as one of the greatest privileges of my professional life that I was able to supplement a two years' course here, with a period of a few weeks' discipline in the office of your distinguished President, Mr. Carter. He already gave promise of that actual leadership which long ago he attained. . . . Now let me say another word for the encouragement of the graduating class. I consider that America is the paradise of judges and lawyers, and especially of lawyers. And when any pessimistic views are expressed, any doubts of what these coming lawyers are to do, I say to them, "Come to New York, Mr. Carter will soon be retiring, and will leave room for a thousand men."

Mr. Carter's untiring and successful work in opposition to the establishment of David Dudley Field's Civil Code, and his brilliant addresses on the *Provinces of the Written and Unwritten Law*, in 1888, on the *Proposed Codification of our Common Law*, in 1883, and on *Ideals and the Actual in the Law*, in 1890, marked him out as one of the fittest jurists in the country for the course of lectures designed. Unfortunately, this course was never delivered; for on February 14, 1905, within a few days after the completion of the manuscript of his lectures, Mr. Carter died suddenly.

In 1905-06, the number of students showed a slight decline, to 725. Strobel and Westengard were still absent in Siam. Jeremiah Smith Jr. (LL.B. 1895, son of Professor Jeremiah Smith, grandson of Chief Justice Jeremiah Smith) gave the course on Massachusetts Law and Practice, being appointed as Lecturer May 8, 1905. Charles J. Hughes, Jr. (appointed Lecturer, Nov. 6, 1905) gave a course on Mining and Irrigation; Charles F. Dutch was appointed Instructor in Admiralty, Jan. 29, 1906; and Samuel H. Hollis, Instructor in Property.

The most important event of the year was the bequest made by James C. Carter of a sum of one hundred thousand dollars to found a new Professorship as follows:

which I now wish may be applied in the establishment and maintenance in the Law School of the University of a Professorship of General Jurisprudence for the especial cultivation and teaching of the distinctions between the provinces of the written and unwritten law; but I do not intend to control the discretion of the donees in respect to the application of this fund. I mention my present preference.

With the record of the addition of the name of Carter to the distinguished list of the great benefactors of the Law School—Royall, Dane, Story, Bussey, Bemis, Weld and Austin; and with the record of the death of Christopher Columbus Langdell, which occurred on July 6, 1906, the narrative portion of this history may be fittingly brought to a close.

There only remains to add that since Langdell's death, a fitting memorial has risen in his honor in the shape of the new Law School Building, named during his lifetime, Langdell Hall.

Of this building, Dean Ames said in his Report for 1905-06:

Langdell Hall is rising rapidly and promises to be a worthy

memorial of Professor Langdell. Although, to our great regret, it was not given to him to see the completion of the new building, it is a great satisfaction to us that he lived to know that the ground had been broken for this monument to his great achievements.

In his Report for 1906-07, he said:

The lecture rooms in Langdell Hall have been used for some weeks. The books are installed, and the entire building is now ready for occupation. In some respects the convenience of the School has been sacrificed to architectural considerations, but the two buildings will, for a dozen years at least, give dignified, attractive and ample accommodations for all the needs of the School.

The following description of the new building has recently been written by Professor Eugene Wambaugh. (1)

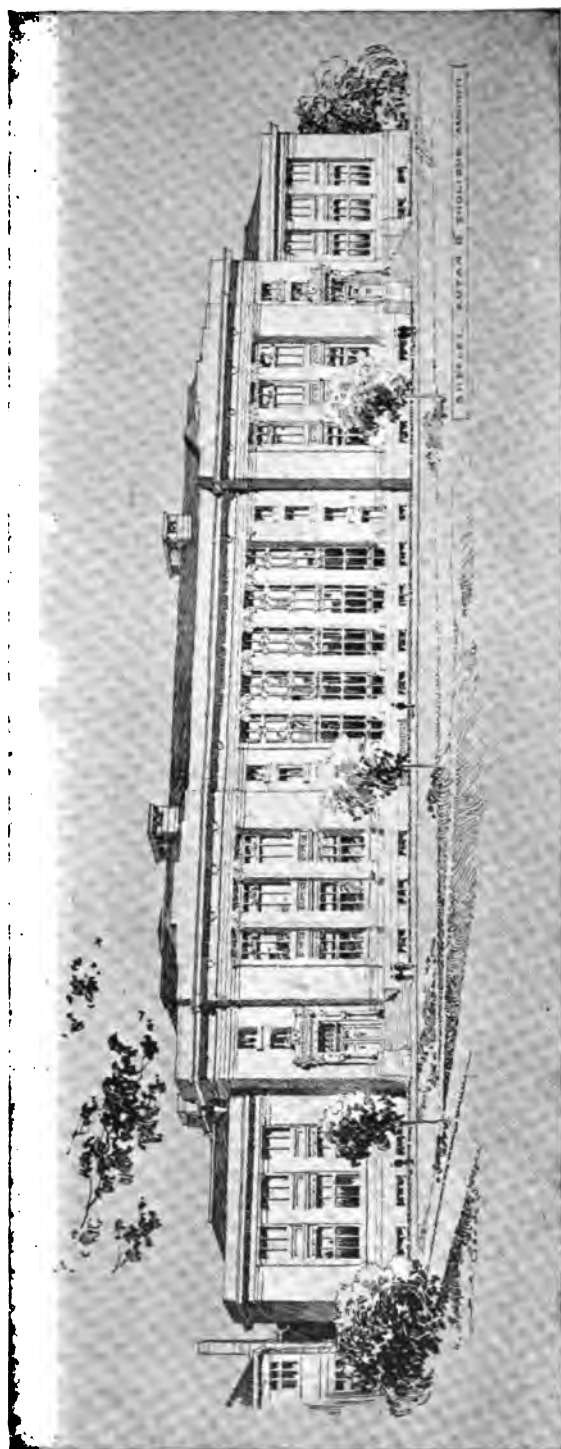
The building was not ready for occupancy at the beginning of the academic year 1907-08, but parts of it were ready shortly afterwards. The first lecture was delivered at 9 o'clock, on Oct. 17, 1907. By the beginning of 1908 nearly the whole of the building was in use.

The present dimensions of Langdell Hall are: from north to south, two hundred and twenty-nine feet; from east to west, seventy feet in the stack, eighty-two feet in the wing south of the stack, forty-seven feet in the wing at the extreme south; and eighty-three feet from basement to roof. The cost, including plants for heating and ventilation, but not including furnishing, has been \$365,000. The cost has been paid out of the surplus earned by the School. When the building is completed, its length will be increased by one hundred and thirty-two feet. In other words, the portion now built is about two-thirds of the whole building. The material is buff limestone. The style is classic. The general effect is square and lofty, reminding one of other works of the architects, Messrs. Shepley, Rutan & Coolidge. Perhaps the most noticeable features are the great Ionic columns—which may serve as reminders of the modest columns that used to ornament Dane Hall. The east and west fronts are identical.

In the northern part of Langdell Hall as it now stands, but in the central part of the building as it is to be, is the library stack, which ultimately will accommodate three hundred thousand volumes. As yet only the eastern half of the stack is fitted with shelving, the western half being used for one supplemental reading room and one small lecture room. At the north and south ends of the stack are studies for the Professors and Librarians. The stack is fireproof, with glass floors and metal shelving; and

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(1) See *Green Bag*, Vol. XX (June, 1908).



**Proposed New Building    Langdell Hall**



on one of the floors are desks for the Professors, separated by glass partitions for the sake of quiet, so that the Professors have that ease of consulting the books and one another which has long been an attractive feature of the Law School.

South of the stack is a broader section of the building, containing on the ground floor a lecture room called Langdell Centre, which is somewhat larger than Austin North and accommodates about three hundred and fifty. Above this lecture room is the main reading room, somewhat larger than the main reading room in Austin Hall. Still farther south is a lower and narrower wing, containing on the ground floor a lecture room which accommodates about one hundred and seventy-five; and upon the upper floor is another reading room which connects with the main reading room by a passage in which are placed works of reference. Around the walls of the reading rooms are several thousands of volumes, chiefly reports that are duplicates of copies in the stack. The main reading room, the south reading room, and the passage connecting these two accommodate two hundred and seventy-seven; and the supplemental reading room in its stack accommodates eighty-four.

The public entrances to Langdell Hall are at the head of broad steps leading to the east and west ends of a corridor that runs between the lecture room called Langdell Centre and the one called Langdell South. There is also a subway connecting Langdell with Austin.

When the whole of Langdell Hall is built, there will be to the north of the stack precisely the same amount of reading room and of lecture room accommodation as is now found to the south of the stack; but the interior arrangements may differ in some details from the arrangements of the parts now completed. The present small lecture room in the stack is to become part of the region for storing books, and the present supplemental reading room in the stack is to become a corridor connecting the southern reading rooms with those which are to be constructed in the northern extension.

In addition to the features already described, there are various conveniences, including a room for the Harvard Law Review, metal lockers, a freight elevator, and an electric lift for books. The woodwork throughout is dark oak. It ought to be added that among the most attractive features are the adequate studies for the Professors and the successful schemes for light and for ventilation. The walls will soon be ornamented with engravings and paintings, without, however, robbing Austin Hall.

According to the present mode of dividing the work of the School between the two buildings, Austin Hall is devoted to most of the lectures in second year subjects and its reading room is supposed to be used by students of that year, for whose benefit the walls of the reading room are supplied with books as heretofore, and the stack is also provided with a large library; and

Langdell Hall is devoted to lectures for first year students and for third year students, and its reading rooms are designed chiefly for them, and its stack holds the principal library, including duplicates of the books found elsewhere.

Between Langdell Hall and Walter Hastings there is to be something like a private yard for the Law School, called the Law Court. Between Langdell Hall and Pierce Hall is a much larger yard. The view of Langdell Hall from either one of these yards is impressive, but Langdell Hall is so completely surrounded by other buildings that no adequate view of it can be obtained from the streets. It already dominates Holmes Field, for it is the largest and most striking building there. It is at present about twice the size of Austin. When finally completed it will probably remain for many years one of the largest buildings in Cambridge, for it will be at least fifty feet longer than Memorial Hall. In style of architecture and in color it differs emphatically from all neighboring buildings. In commenting upon this diversity, an English barrister said—as doubtless many an American lawyer will say—"From what I know of Professor Langdell's services to the law I am of opinion that a monument to him may appropriately be unique."



## CHAPTER XLVII.

### THE LIBRARY 1869-1907.

It is not by reason of methods and instructors alone that the Harvard Law School has stood in the forefront of the progressive movement of legal education. From Judge Story's advent, in 1829, until the present day, its Library has excelled all other law school libraries in size and completeness.

That this has been the fact has been chiefly due to the conviction, shared in by all its various Professors, that the possession of a complete law library was essential and that constant use of the library by the students was one of the most beneficial parts of their education.

Since lack of funds, during the War Period, had greatly retarded the growth of the Library, it was one of the chief aims of Langdell and Eliot and of the Corporation to build it up to its proper size and scope; and the Annual Reports of the Dean and of the President contain constant references to the reforms introduced into its administration.

In the very first year of the new régime, nearly \$2,000 was spent for books and binding (as contrasted with an average of about \$800 for the preceding ten years) "the Library being regarded as a principal means of instruction," wrote President Eliot, in his Annual Report for 1869-70.

The most important and radical reform introduced was the appointment of a permanent Librarian. (1) James A. L. Whittier was appointed by the Corporation, January 6, 1870, at a salary of \$500, his term to date from September 7, 1869. On May 27, 1870, it was voted to "dispense with the services of J. A. L. Whittier as Librarian after Sept. 1," and September 30, William A. Everett was appointed in his place at a salary of \$1,000.

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(1) President Eliot said in his Annual Report, the same year, 1870-71: "The Law School of the University, besides its formal courses of instruction, offers great incidental advantages. Its rich Library is an indispensable aid to the student. The Corporation, feeling the importance of still further enlarging this Library and improving its administration, have, during the year 1870-71, employed a permanent Librarian, spent about \$1,200 on the shelves and other fittings of the room, and about \$3,000 on books and binding."

The next year, Dean Langdell introduced important changes in the administration of the Library, the Corporation appropriating \$800, October 14, 1870, for the repairs made necessary.

These were described by him in his Annual Report for 1870-71 as follows:

At the beginning of the year important changes went into effect in regard to the Law Library. Prior to that time, it had all been kept together, the books being arranged in alphabetical order, and there being no systematic attempt to provide duplicates of such books as were in constant use. From the opening of Dane Hall in the morning to the closing of it in the evening the entire Library was accessible, without restriction and without supervision, not merely to the members of the School, but to all persons. The Librarian had generally been a member of the School, who occupied a room in Dane Hall, and received a trifling compensation in addition to his room-rent and tuition. It was not any part of his duty to spend any of his time in the Library; still less to exercise any authority or supervision over those who used it. The janitor had certain duties to perform in reference to the Library; but it was not his business to exercise any authority or supervision over those who used it, nor was he expected to remain in it, except when certain specific duties required his presence. In fact, as the Librarian and janitor were situated, it was out of the question for them to exercise a constant supervision over the Library, and any partial supervision would have been useless.

The result of this system being found very unsatisfactory, it was decided to make three radical changes, namely: first, to require the constant attendance of the Librarian or his assistant in the Library during all the hours that it was open; second, to render the general library inaccessible except with the Librarian's permission; third, to procure duplicates of all such books as are in constant use, and with these to form a working library, to which every student should have free access. (1)

(1) The necessity for these changes, however, was well stated in the Report of the Law School Visiting Committee to the Overseers, in October, 1871:

"Under the new rule there is an obvious advantage that a student seeking a book, if it is not in its place, can at least be told where it is. . . . The Librarian also has discretion to give access. . . . The Committee regret that any restraint should be found necessary, but they consider the present rule as an experiment to which fair trial should be given. The evil which it was introduced to remedy was real and pressing. . . .

Losses have been of a very serious character heretofore. The reason why no more exact statement can be made is the fact that no correct catalogue of accessions has been kept for the last twenty-five years; and as there are no means of knowing accurately what or how many books make up the Library, it is impossible to state accurately what or how many are missing or lost. The last catalogue was printed in 1846, and since that time a chronological list of accessions has been kept which is of little use for reference and is stated to be not entirely trustworthy. . . .

During the summer vacation of 1870, these changes were carried into effect. A permanent Librarian was employed, whose duty it was made to devote his whole time and attention to the interests of the Library. The working library was formed in the main by taking such books from the general library as seemed desirable for that purpose, and supplying their places with new copies.

The working library is separated from the general library by a railing, and when books from the latter are wanted, they are given out by the Librarian and his assistant, the names of the books being entered on a slip of paper, which is retained until the books are returned. When a student asks permission to go behind the railing to examine books, such permission is never refused when the Librarian is present.

In connection with the Library, it is proper to notice another important change. It had always been the practice to furnish every student, as a gratuitous loan, with a copy of every text-book used in the School. This made it necessary to purchase from one hundred to one hundred and fifty copies of every new text-book introduced; and as the works used as text-books sometimes consisted of as many as three or four volumes, and as the books thus purchased were generally superseded in a few years by other books, or by new editions, it was found to be a great and constant source of expense to the School; so great, indeed, that the general library had suffered severely in consequence, it being impossible, for want of funds, to supply its most pressing needs. This practice has been entirely discontinued since the beginning of the year 1870-71, so far as the purchase of new books is concerned; and students have been left to supply themselves with such books as have been introduced since that time. No reason has been seen for doubting the wisdom of this change. There are obvious advantages to the student from owning the books which he uses as text-books; he can always supply himself with the best editions; and, as the course of study is not arranged, it is believed that the necessary expense for text-books in the Law School is not materially greater than in the College proper.

These changes, it is to be noted, were almost exactly those recommended by the sub-committee of the Library Visiting Committee in the early part of the previous decade, which had been so earnestly opposed by the Law Faculty of that period. They were also made in conformity with the Report of the Visiting Committee to the Board of Overseers, of October 17, 1870, which said:

It is much to be regretted that the Library, which was formed on a comprehensive plan, has not, of late years, kept up with the progress of the law, and that its condition, as respects the pre-

servation of the books, is not agreeable to the lover of books, or the lover of learning. The attention of the Law Faculty is directed, as the committee have reason to know, to some method for the better preservation of the Library, and for the more careful and systematic selection of books by purchase; and it is much to be desired that such a plan may soon be devised and carried into execution. (1)

The students themselves strenuously opposed one of these new reforms—the institution of the railing, preventing access to the books. William A. Everett, Librarian at that time, writes (1908):

The rail which fenced off the main portion of the Library from the reading room was obnoxious to the older students who had been able to "browse around" (as Lincoln has it) among the books at their sweet will, without the restriction. One K——, one of the most industrious men in the School and doing excellent work, was defiant in ignoring the rule and openly determined on having his own way against all I could say to him. So finding myself of no account with the man, I reported the case to Dean Langdell. He was thoroughly alarmed at the crisis. "What can I do? What can I do?" was all that he could say. I replied that it was up to him to settle the affair, for I proved myself powerless for the first time. His advice was "Write to the President." So I sent a statement to President Eliot. In a few hours a sealed letter was laid on my desk by the College Secretary addressed to K——. I watched him quietly while he read it and I think I never saw a person more astounded. I had no difficulty with K—— thereafter. The President had settled the case with his usual decision.

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(1) This Report had called forth from ex-Professor Joel Parker a powerful and sarcastic reply, in which he reviewed at length the administration of the Library during his term of office, and called the report an attempt "to herald the glory of the new order of things by a little depreciation of the old."

He pointed out, especially, the low condition of the School's finances, during his régime, in its effect on the Library. He also insisted vigorously that the freest access to the Library by the students was an absolute necessity, and he concluded:

"The usage of the School, which for forty years gave the students free access to the books in the general library, a privilege which the Professors deemed, if not essential, highly valuable, and of which even the special committee, in 1862, said, 'The privilege cannot be abridged, and rules must be made to conform to this necessity,' has itself been made to conform to some other necessity, and the students are now fenced off from access to the books, except as they receive them from the hands of the Librarian, or his assistants. They can therefore rest assured that their morals are secured thus far, and if a sufficient number of washstands, with their appurtenances, shall be provided, the new additions may be preserved to some extent, in such condition as to be agreeable to that class of the lovers of books, who think more of their covers than they do of their contents."

It could not be expected, however, that so radical a revolution in the Library administration, would meet with immediate acceptance, or could be initiated without temporary embarrassment. Nevertheless its operation soon became satisfactory. President Eliot and the Corporation cordially sustained Langdell in all his ideas, recognizing, as Eliot said in his Annual Report for 1872-73, "the fact that the Library is the very heart of the School," and as Langdell said, the same year, "everything else will admit of a substitute or may be dispensed with; but without the Library the School would lose its most important characteristic, and indeed its identity."

After the reforms in the administration and care of the Library were well established, two grave problems confronted the School. The first was the inadequacy of the rooms containing the Library, not only by reason of lack of space for books, but through their seriously overcrowded condition in their daily growing use by the students.

In his Annual Report for 1873-74, Dean Langdell said:

Notwithstanding the facilities for study in the Library were materially increased during the year 1873-74 it not infrequently happens that there are more men in the Library than can find places at the tables; and on no day in the week is the Library so crowded as on that which has always been a holiday in the School, viz., Saturday. Nor is this to be regarded merely as testimony to the industry of the School; it is still more significant as indicating the *kind* of work that is in vogue. The work done in the Library is what the scientific men call original investigation.

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This opposition continued for several years, and was well voiced by Jesse C. Ivy (L. S. 1874-77) in the *Harvard Advocate*, Dec. 17, 1875 (Vol. XX), in an article on *The Law School Library*:

"There are about 1,800 volumes, embracing the principal English, Massachusetts, United States Supreme Court, New York reports and a few general treatises, digests, etc., which the student during the hours the Library is open may take from and return to the shelves at pleasure. The remainder, 14,000 volumes, is behind what is known as "the Bar." To get any of these latter books you must write the name of the book, the number of the volume and your name upon a slip of paper, hand it to the Librarian or his assistant, await if he sees proper his conclusion as to whether the book is outside "the Bar" or not, and abide his return with the book.

The time lost, laying aside the apparent red tape of this proceeding, often would be sufficient to read the case sought. . . . A book kept outside compared to one kept inside the Bar passes from student to student nearly as fast. In fine, we know of no better commentary on the present arrangement of the Library than the remark of several considerate students that they thought at least one quarter of the time spent in the Library, lost."

The Library is to us what the laboratory is to the chemist or the physicist, and what a museum is to the naturalist. (1)

This problem was solved by the erection of Austin Hall and the removal of the School thither, in 1883.

The second problem was the wear and tear upon the books and reports and their actual destruction arising from the increased use of the Library. And as the Case System became more and more adopted, this consumption of books increased. The difficulty, sometimes the impossibility of replacing single volumes of sets of reports, was a constant source of despair to the Librarian and to the Dean. Reprinting of lost or injured volumes—a costly expedient—was sometimes resorted to. (2)

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(1) In 1876-77, President Eliot spoke of the Library room as being too small for the readers, and that the "very valuable Library ought to be secured in a fire proof building."

In 1877-78, Dean Langdell noticed the temporary makeshift which had been brought about during the Christmas recess at a cost of \$900, by altering the lower story of Dane Hall so as to take two of the small rooms into the Library room, and said that so "much inconvenience had been experienced from the crowded state of the Library. This evil had increased to such a degree that members of the School not unfrequently were unable to find a place to sit. During the cold weather, also, it was found impossible to obtain sufficient ventilation without making the room too cold for either comfort or safety."

In 1878-79, Dean Langdell said that "regarded as a repository for books, the accommodation afforded by Dane Hall is very bad in quality and in the near future will be absolutely insufficient in quality;" and that the danger to the books from fire was a cause of constant anxiety and that there was a great want of space for the Professors and Librarian to work in.

(2) Thus in 1874-75 Dean Langdell said:

"The administration of the Library is still highly successful, and the resort to it is constantly increasing. Indeed, this resort has become so great as to bring with it serious evils; it brings a very great wear upon the books and makes the position of the Librarian and his assistant very laborious.

The general library is made up largely of books and sets of books whose intrinsic merit may be of an inferior order, but which are not in the market, and which it is almost impossible to procure. Experience has shown that a whole set of such books may be ruined by the excessive use of a single volume for a special purpose. A case has recently occurred in which it will probably be necessary to reprint several pages of a volume of reports (which have been literally worn out), as the only means of restoring the set. The contrast referred to is very striking in the case of books of reports. Many of those in the greatest demand are stereotyped, so that not only any single volume, but any part of any volume, can be had without difficulty; while many of those in least demand cannot be had at any price, because the demand for them is not sufficient to warrant a new edition."

Fifteen years later, in 1890-91, he said:

"When the system of teaching by cases was first introduced, it was found impracticable to employ it without printing the cases to be used; and yet the School was then only about one third of its present size.



Austin Hall—View of Library Reading Room, Second Floor





The partial solution of this problem was brought about by the gradual introduction of case books in nearly all the courses, and by the purchase of duplicate and sometimes triplicate sets of reports.

#### GROWTH OF THE LIBRARY.

At the beginning of 1869-70, excluding the text books bought for the use of the students, the actual number of volumes in the Library could not have exceeded 10,000.(1) In 1906-07, according to the report of the College Librarian, the number of volumes was 102,826 and the number of pamphlets 11,185.

The chief credit for this remarkable growth is due to the indefatigable labors and expert skill of the Librarian, John H. Arnold, and to the painstaking and laborious interest taken by Dean Langdell, whose "great knowledge of the literature of the law, and whose willingness to devote much time to consideration of the needs of the Library were of incalculable value"—writes Mr. Arnold. In the first two years, the purchases made were almost entirely of books to cover the pressing needs of the Library.(2)

Now, however, the system is so well established and so much in vogue that it is found practicable to employ it in the largest classes, though no member of the class be able to study the cases used except in the books belonging to the Library; and it is actually so employed to an extent that threatens speedy ruin to the Library; and yet the very circumstance which renders this practice now so peculiarly destructive to the library, namely, the large size of our present classes, renders printing much more feasible than formerly, as it enables an instructor who incurs the expense of printing a collection of cases to reimburse himself much more speedily than formerly.

"It should be clearly understood that its not the *amount* but the *kind* of use to which it subjects the Library that constitutes the chief objection to the practice in question. In short, the objection to it is that it causes the speedy destruction of some portion of every volume of reports containing one or more cases to which a large class is referred, *i. e.*, so much of it as comprises the case or cases referred to. Nor is the mischief confined to the particular volumes thus ruined; for volumes of reports are generally in sets, and the ruin of one volume in a set is the ruin of the entire set to which it belongs."

(1) *The Harvard Law Library in Harv. Grad. Mag.*, Vol. XVI (Dec., 1907).

(2) In 1873-74, Dean Langdell reported that more money had been expended for books than in any previous year:

"This is accounted for partly by the fact that a gift from Judge Curtis enabled us to provide ourselves with duplicate sets of Peter's Reports and Howard's Reports, and also with a set of patent cases which we had hitherto been deterred from purchasing by their excessively high price; partly also by the fact that the Corporation made a special appropriation to enable us to purchase a superb set (which was offered to us) of the series of Scotch Reports commonly known as Court of Session Cases in fifty-one large volumes."

Beginning with January, 1874, special attention was paid to auction sales of law books; and, Mr. Arnold writes in his recent article: "From 1874 to the present time, auction sales of law books have been most carefully attended by the Librarian. The catalogues of the second-hand book sellers, both at home and abroad, have been searched for old books that were not to be found in the Library. The Librarian has been abroad on three occasions, in 1888, 1892 and 1898 in pursuit of book rarities." (1)

In 1876-77, the College Librarian made his first formal Report, appended to the President's Annual Report; and since his Report of 1879-80, the yearly increase of the Law Library, as well as the number of volumes and of pamphlets in the Law Library each year, has been stated officially.

From these Reports, it appears that the Library had grown, in 1889-90, to 25,251 volumes and 3,245 pamphlets. In that year, Dean Langdell said in his Annual Report:

Now, it is believed to be larger (referring only to law books proper, and excluding statutes), more complete, and in a better condition than any other law library in the United States, with the possible exception of the National Library at Washington. Its duplicates, triplicates, and quadruplicates of English and American reports alone number 3,040 volumes.

In 1891-92, the English reports numbered 1,637, and, the next year, the American reports numbered 2,194. In 1896-97, Dean Ames reported that there were three sets of English and Federal reports, two sets of all American reports (except West Virginia) and three sets of American reports of twelve States.

"When Austin Hall was built it was expected," writes Mr. Arnold (1907), "that it would be ample for both School and Library for the next 50 years. For more than ten years, it has afforded insufficient accommodation for the School, and, although

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(1) In 1889-90, President Eliot thus described the changes in this respect brought about by the new régime, in his Annual Report:

"Prior to 1870-71, and subsequently to the time of Professor Greenleaf, no one connected with the School took much interest in the subject of purchasing books for the Library. The practice was for the booksellers with whom the School kept an account to send to the Library a copy of every new book received by them; and, as to each book so sent, one of the professors decided whether it should be kept or not. As to the purchase of other than new books, there was no system whatever; and such books were seldom purchased unless for some special reason; and when it was decided to purchase any such books an order for them was given to a bookseller. Under this practice the library seldom received any accessions of old books."

the book stack has been doubled in size, and has about 60,000 volumes upon its shelves, it has been necessary to place more than 40,000 volumes in outside buildings. The present size of the collection exceeds 105,000 volumes, a gain since 1870 of about 95,000." (1)

Since the above was written, the Law Library has been removed to Langdell Hall, and is now located in a specially designed stack with glass flooring, and with no combustible material in any way connected with it.

The following table gives the number of volumes and of pamphlets in the Law Library in each year, and the number of yearly additions as reported by the College Librarian in his Annual Reports:

	No. Volumes.	No. Pamphlets.	No. Vol- umes added during the year.	No. Pamph- lets added during the year.
1877-78.....	16,907			
1878-79.....	17,500			
1879-80.....	19,909	2,700	935	
1880-81.....	19,609	2,777	600	
1881-82.....	20,603	2,817	994	

(1) As already described in Chapter XVIII by vote of the Corporation, Nov. 17, 1818, many books were at various times transferred from the College Library to the Law Library for use of the law students.

In 1888, the question of the return of these books to the College Library in Gore Hall was raised by request of members of the Harvard College Faculty, and a statement was made to the Corporation with regard to them and to their return.

On Nov. 26, 1888, the Corporation voted:

"That the Librarian of the College Library be requested to send to the Corporation a memorial for communication to the Law Faculty concerning the books which were transferred some years ago from the College Library to the Library of the Law School, some of which are required for use at the College Library."

After a good deal of consideration and correspondence, and with some opposition on the part of the Law Faculty, the matter was finally disposed of by the return of the books, comparatively few in number, to the College Library on February 11, and March 31, 1896. The books returned were arranged in five classes as follows:

- (1) Books given by Thomas Hollis as appears from the seal.
- (2) Books having the College seal.
- (3) Books given by Theodore Atkinson as appears from the initials T. A. on the covers.
- (4) Books identified by the College shelf marks.
- (5) Books answering the description in the lists referred to in the statement to the Corporation but incapable of identification as coming from the College Library.

Justin Winsor then College Librarian, wrote as to this settlement, "It is a pleasure to record that this long pending question has been finally settled to the entire satisfaction both of the College Library and the Law School."

1882-83.....	19,934	2,852	523	
1883-84.....	20,952	2,890	1,028	
1884-85.....	21,598	2,916	680	
1885-86.....	22,298	2,929	750	
1886-87.....	22,980	2,952	682	
1887-88.....	23,657	3,022	6,777	
1888-89.....	24,498	3,191	841	
1889-90.....	25,251	3,245	753	
1890-91.....	24,498	3,191	841	
1891-92.....	28,157	3,544	1,705	
1892-93.....	32,151	3,879	3,994	
1893-94.....	33,931	3,917	1,780	
1894-95.....	35,615	4,222	1,684	305
1895-96.....	37,909	4,326	3,228	104
1896-97.....	40,872	4,471	2,963	145
1897-98.....	44,340	5,241	3,468	770
1898-99.....	50,412	6,126	6,072	881
1899-00.....	56,621	6,606	6,209	480
1900-01.....	62,523	6,421	5,902	324
1901-02.....	67,582	6,825	5,059	425
1902-03.....	75,877	7,006	8,392	440
1903-04.....	81,808	8,750	6,061	1,853
1904-05.....	88,307	8,926	6,540	198
*1905-06.....	96,545	10,608	9,189	1,682
1906-07.....	102,826	11,185	6,298	1,183

From the above it will be seen that the number of books increased in thirty years from about 17,000 to about 103,000, or six-fold.

The following table shows the amount spent for books and binding and the income from the Law Book Fund, as stated in the Treasurer's Annual Reports:

	Amount spent for books.	Amount spent for binding.	Income of Law Book Fund.	Income of Law School Library Fund.
1869-70.....	\$1,538.05	\$ 390.03	.....	.....
1870-71.....	2,719.62	719.69	.....	.....
1871-72.....	2,576.83	967.44	.....	.....
1872-73.....	2,678.05	870.88	.....	.....
1873-74.....	4,141.60	853.56	.....	.....
1874-75.....	3,065.26	511.45	.....	.....
1875-76.....	3,184.24	578.44	.....	.....
1876-77.....	2,678.99	528.42	.....	.....

\*Previous to this year, the figures are given for the year ending Sept. 30. In 1905-6, and subsequent years, the figures relate to the year ending July 31.

1877-78.....	\$2,260.00	\$ 426.91	.....	.....
1878-79.....	1,971.32	386.75	.....	.....
1879-80.....	2,586.03	336.81	.....	.....
1880-81.....	1,792.01	317.90	.....	.....
1881-82.....	2,477.45	.....	.....	.....
1882-83.....	2,926.50	.....	\$2,746.78	.....
1883-84.....	2,825.00	.....	1,655.49	.....
1884-85.....	2,358.53	.....	1,738.74	.....
1885-86.....	2,695.06	.....	1,661.89	.....
1886-87.....	2,188.00	.....	1,633.07	.....
1887-88.....	2,143.04	.....	1,601.05	.....
1888-89.....	2,690.00	.....	1,827.90	.....
1889-90.....	2,345.17	.....	1,962.66	.....
1890-91.....	4,003.75	.....	2,282.12	.....
1891-92.....	4,741.34	.....	2,431.58	.....
1892-93.....	9,447.09	.....	2,346.35	.....
1893-94.....	4,772.10	.....	2,275.82	.....
1894-95.....	3,598.77	.....	2,125.32	.....
1895-96.....	8,552.27	1,149.41	2,224.09	.....
1896-97.....	10,938.93	1,364.92	2,209.99	.....
1897-98.....	7,402.31	1,597.52	2,054.82	.....
1898-99.....	11,585.15	964.76	2,158.26	\$4,590.00
1899-1900....	11,061.83	1,523.53	2,144.16	4,560.00
1900-01.....	11,884.67	2,666.13	2,209.99	4,700.00
1901-02.....	9,421.72	2,084.20	2,257.01	4,800.00
1902-03.....	11,719.45	2,008.84	2,200.58	4,680.00
1903-04.....	11,947.61	2,210.68	2,242.90	4,770.00
1904-05.....	12,474.98	2,665.00	2,313.43	4,920.00
1905-06.....	13,738.75	2,324.53	2,228.80	4,740.00

From the above, it appears that in thirty-eight years, the annual amount spent for books increased from \$1,722 to \$13,738; or eight-fold; and the annual amount spent for binding increased from \$390 to \$2,324; or over six-fold.

Some of the features in which especial pride is taken are the following, as given by the Librarian:

1. Completeness of the collections of American, English, Irish, and Scotch Reports. There are two copies of all the American State Reports, and in many cases three copies; two complete copies of the Irish, and four or more copies of nearly all the English Reports.

2. An unusually complete collection of English Colonial Reports and Statutes.

3. American Statute Law, almost complete since 1800, and very rich, though incomplete, in the rare and costly revisions and session laws of an earlier period.

4. A collection of Local and Private Acts of Great Britain complete from 1820 to 1906. This collection is believed to be unique so far as this country is concerned.

5. A collection of trials, civil and criminal, remarkable in extent. It includes a complete set of the Old Bailey Sessions Papers, continued by the Central Criminal Court Papers, covering the period from 1729 to date.

6. A very full collection of legal periodicals.

7. A large collection of civil and foreign law.

8. A collection of Peerage Cases, purchased in 1892. At that time there was but one collection superior to it in England.

9. The early Year Books, as issued year by year, by famous printers, unsurpassed by any known collection.

10. The quality and number of editions of the standard and famous legal treatises. Among such works may be mentioned Coke's *First Institute*, in every English edition, from the first in 1628, to the last in 1832; Blackstone's *Commentaries*, in nearly every edition, some 49 in number, including the first; *Complete Clerk*, five editions; St. Germain's *Doctor and Student*, 22 editions; *Trials per Pais*, 9 editions; Fearne's *Contingent Remainders*, all the editions; Fitzherbert's *New Natura Brevium*, 13 editions; Glanville's *Laws of England*, 6 editions; Greenleaf's *Evidence*, all the editions except the second and third of vol. 1; Kent's *Commentaries*, all the editions; Littleton's *Tenures*, 34 editions; *Old Natura Brevium*, 9 editions; Perkins's *Law Conveyancer*, 17 editions; Sheppard's *Touchstone*, 7 editions; Story's Works, all the editions of every treatise, except one or two.

#### LIBRARIANS.

There have been only three permanent Librarians during the Langdell régime and since 1870—William Abbott Everett, Sept. 30, 1870—Sept. 29, 1871; Abraham Walter Stevens, Sept. 29, 1871—August 7, 1872; and John Hines Arnold, appointed August 7, 1872.(1)

(1) Mention should also be made of the valuable services of the Assistant Librarian, George A. Arnold, who died Feb. 5, 1894, of whom Langdell wrote in his report in December, 1894:

"During the year under review, the School met with an irreparable loss in the death of its assistant-librarian, George A. Arnold. He entered the service of the School in 1872, at the age of twenty-one, and remained in its service continuously until his death. During all that time he was distinguished for his faithfulness, his amiability, and his disinterested devo-

Of the latter, nothing need be added to Dean Langdell's remarks at the dinner of the Harvard Law School Association in 1891, referring to the making of the catalogue. "Fortunately we had a Librarian whose devotion to the School knew no limits."

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tion to the interests of the School. Soon after his death the Corporation marked its sense of the value of his services by making a substantial provision for his family out of the surplus income of the School, and it gives me much satisfaction to add that this was done upon the unanimous recommendation of the Faculty."

## CHAPTER XLVIII.

### INFLUENCE OF THE SCHOOL AND OF THE CASE SYSTEM.

It was the success of the Harvard Law School under the Story régime which was largely responsible for the growth of American law schools after 1830.

In 1833, the Cincinnati Law School was founded by Timothy Walker, a student of the Harvard Law School in 1829-30. In 1836, the Carlisle Law School was founded in Pennsylvania. In 1842, there were ten law schools in the United States, having 19 Professors and 384 students.<sup>(1)</sup> In 1843, the Yale Law School (though founded earlier) first granted degrees. In 1846, the Louisville Law School was founded in Kentucky; in 1847, the Lebanon Law School, in Tennessee, and the University of New Orleans Law School; in 1850, the University of Pennsylvania Law School; and in 1851, the Albany Law School.

Professor Greenleaf wrote to the Harvard Corporation in 1847, calling their attention to "the increase in attention which legal education had attracted in the last few years"—the placing of the Yale Law School on a permanent foundation, and new schools in New York, New Jersey, New Orleans and elsewhere,—and said: "Nothing has contributed more to this than the establishment of the Cambridge School, which has now its imitators and will soon have its rivals in all parts of the Union."

In 1858, the Columbia Law School in New York was re-established. In 1859, the Law Department of the University of Chicago was established (later, in 1873, the Union College of Law, and since 1882, a department of the Northwestern University). In the same year, the University of Michigan Law School was started. In 1865, the first law school west of the Mississippi River was founded—the Iowa Law School (later, in 1868, a department of the State University of Iowa). In 1867, the St. Louis Law School was established.

In 1891, there were 58 law schools with 6,073 students; in 1900, 96 schools with 12,516 students, and in 1903, 104

(1) See *Western Jurist*, Vol. IV (1870); *American Almanac* for 1843. Professor Joel Parker in his pamphlet *The Law School of Harvard College* (1871), says that in 1848 there were only 9 law schools.



with 14,127 students.(1) Professor Simeon E. Baldwin of the Yale Law School says (2) that for nearly a hundred years the history of legal education in the United States was nearly stationary; and that the forward movement which came in the 1870's was marked by three great events; the creation of a Committee of Legal Education by the American Bar Association, the extension of the term of study for a degree of LL.B. at Harvard and Boston University, from two to three years, and the publication by Langdell of the first case book which was prepared solely for use in law school instruction.

Of the great effect upon American legal history of the last of these three factors—the Langdell Case System—the following synopsis will give ample proof.

While the publication of Langdell's first case book—his *Cases on Contracts*—did not meet with a cordial reception from the Bar in general, it is to be noted that the first review which appeared in any magazine was extraordinarily complimentary, the *American Law Review* (Vol. V), then edited by O. W. Holmes Jr. and Arthur G. Sedgwick, saying, April, 1871:

Mr. Langdell's scheme is to present without comment the series of cases by which an important principle has been developed, arranged in order of time, and after indicating by the heading of the chapter and section the topic to be illustrated, to leave the rest to the student. Even head notes are wisely omitted. . . . The chronological arrangement, though it may sometimes add to the labor of a beginner, we have found to be most instructive and interesting. Tracing the growth of a doctrine in this way not only fixes it in the mind, but shows its meaning, extent and limits as nothing else can. We must mention that we have been struck with the confirmation here afforded to a remark made on the first page of this volume of the *Law Review*, that Judges know how to decide, a good deal sooner than they know why. . . . The only criticism that has occurred to us is that the cases on Forbearance, in Section 4 of the chapter on Consideration, are collected with an over-scrupulous minuteness. It seems as if the desire to give the whole history of the doctrine had led to putting in some contradictory and unreasoned determinations which could

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(1) See *Decade of Progress in Legal Education*, by E. W. Huffcut, *Amer. Bar Assn. Proc.*, Vol. XX (1902).

See especially address of Henry Wade Rogers, *Amer. Bar Assn.*, Vol. XIII (1897).

Report of Committee on Legal Education, *Amer. Bar Assn. Proc.*, Vol. XXVI (1903).

(2) See *The Study of Elementary Law*, by S. E. Baldwin, *Yale Law Journal*, Vol. XIII (1903).

have been spared. Indeed, one surmises that a skeptical vein in the editor is sometimes answerable for the prominence given to the other side of what is now settled. But very likely he had deeper reasons and is right. At all events, we advise every student of the law to buy and study the book. If he does not find that the plan of it is both original and instructive we shall be mistaken.

The next year, the *American Law Review* (Vol. VI) said in January, 1872:

We have already expressed our very high opinion of this selection in noticing the first part. Further reflection and examination have confirmed us in our estimate. . . . If the present generation is to improve upon the text books of the last out easily may it must work in the direction followed by Mr. Langdell by discarding popular and adopting legal distinctions.

We do not agree with him, however, in his seemingly exclusive belief in the study of cases. We should not shut our eyes to a rapid and continuous view of the principle deduced from them, and this can only be got in the text books. The popular prejudice that a case lawyer is apt to want breadth has something in it. Altho' it is certain that the opposite danger is more to be feared nowadays in America. Moreover, to put a beginner upon the cases without aid or introduction, seems to unnecessarily increase difficulties which he is sure to find great enough however assisted. We think he would find the present work a pretty tough *pièce de résistance* without a text book or the assistance of an instructor. The students of the Harvard Law School are to be congratulated that they have the aid of Mr. Langdell's learning and remarkable powers in their task.

And in the same volume, in a review of Emory Washburn's *Lectures on the Study and Practice of the Law*, the following condemnation of the old system of legal education was made:

We do not make this objection so much against Mr. Washburn as against the whole system of instruction of which his book is a part. Both in England and America, the system of legal education rests upon a practical not a philosophical basis. The instruction in both countries consists of instilling into the minds of students a great number of heterogeneous and often incongruous rules which are to be learned by rote and turned to account when occasion serves. . . . The student learns for instance that according to the English law children of the half blood do not inherit; but he does not learn why.

One of the most discriminating contemporary articles on the

subject of the Case System is to be found in the Harvard undergraduate paper, the *Magenta*, December 4, 1874:

It will not be denied that the School is at present in a transition period; as such, it deserves every allowance. It would be difficult to state to what extent, or in what variation, the new system will change the old methods; in fact the reformers admit they have no definite plan as to extent, but they think as all who have examined into the matter will agree, that they have struck a rich vein which it will pay to work. The keynote to the new system seems to be that law is a science; that considered as a science it consists of certain principles or doctrines; that by mastering these doctrines and the application we shall know what the law should be to be logical, where it is illogical and how it is illogical. It conceives that these doctrines can be most advantageously studied by taking a series of cases carefully selected from the reports, and making them the subject of study and instruction; and hence the new system is to select, classify, and arrange all the cases which have contributed in any important degree to the growth, development, or establishment of any of the essential doctrines—to study the law systematically from its original sources. The criticisms made here will not take issue with the new theory of instruction by cases. But lack of time and experience to test and impart it in such a masterly form, method, and application, as we may hope to see the future produce, we believe, should prevent its extensive or very general introduction at present.

The criticism we would advance is that the present curriculum is unsatisfactory in that it does not treat of the law as a whole, and neglects to give that general instruction which is very desirable and necessary for a student at this period, and was met by Chancellor Kent in his famous *Commentaries* prepared for and delivered to classes of law students for the purpose of presenting to them a complete judicial outline.

Moreover, too much time is devoted to a single branch, and no instruction given in several branches of no less importance. As an example, in the important subject of Equity, a whole year of careful and most able instruction is given in discovery alone—a single division of Equity—one that is wholly unused, while a general outline of the subject is omitted.

The central fault in the system is not that the theory is incorrect, but that its application as a practical matter to the School and the study of the law is not as yet a success, and a modification seems desirable.

The old system taught by deduction, giving principles, and then substantiating them by cases and reasoning.

The new system teaches by induction giving cases and from these extracting principles.

There are three reasons why this method should only be used to a limited extent in a law school first, because of the unnecessary

limit of human life to three-score and ten; secondly, because of the inconvenient and undesirable lack of experience incident to youth; thirdly, because an institution owes it to the public to supply the market as well as to elevate the market.

Its great need is a curriculum better adapted to the time and the student.

The present system presupposes that the student has a well trained mind, has four years at least to devote to the theory of the law and then several years more in an office to devote to the practical part.

A more favorable article appeared in the *Harvard Advocate* (Vol. XIX) on February 19, 1875, written by James J. Myers, (L. S. 1869-73) in which he said:

The means of giving thorough legal discipline and accurate knowledge or of promoting correct methods of work and habits of thought acquired by old lawyers by patient study of cases, these things the Harvard Law School adopting the same methods, . . . aims to give to its students at the very beginning of their career. . . . A second prominent feature is the attention given to the study of Common Law Pleading. Other important features may be mentioned in the number and excellence of its law clubs and the high order of work done in them; the earnest and enthusiastic spirit of work which animates nearly the whole school, filling the Library, day and evening, with zealous workers.

In 1877, when Langdell's *Summary of Equity Pleading* appeared, the *American Law Review* (Vol. X) said: "This is in our opinion one of the most remarkable books which has ever been written upon a legal subject by an American author . . . it could only have been written by a great lawyer and every page shows the hand of a master such as has rarely appeared in our literature."

On the other hand, the *Southern Law Review* (Vol. III, N. S.) published a distinctly unfavorable review, containing the following criticism characteristic of those who misunderstood Langdell's views: "Why the study of Equity Pleading at Harvard University in 1877 should be limited to the system as it existed prior to 1827 (the end of Lord Eldon's chancellorship) is not explained."

The *American Law Review* (Vol. XIV), two years later, (1879) paid an enthusiastic tribute to Langdell in a review of the second edition of his *Contracts*:

It is hard to know where to begin in dealing with this extraordinary production equally extraordinary in its merits and its

limitations. No man competent to judge can read a page without at once recognizing the hand of a great master and every line is compact of ingenious and original thought. Decisions are reconciled, which those who made them meant to be opposed, and drawn together by subtle lines which were never dreamed of before Mr. Langdell wrote. It may be said without exaggeration that there cannot be found in the legal literature of this country such a tour de force of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting actions.

In this same year (1879), the *Southern Law Review* in reviewing the second edition of Langdell's *Cases on Contracts* said:

We never could clearly appreciate why this collection (now for the first time issued in two volumes), and Professor Langdell's corresponding collection of *Cases on Sales* were published. He appears to have had a hobby, and this hobby that the law ought to be taught exclusively by means of cases in some form.

. . . We suppose we must accept a reappearance of the second edition of this work without much change as an evidence that Professor Langdell's original views are still persisted in. There is just as much sense in endeavoring to instruct students in the principles of law by the exclusive reading of cases as there would be in endeavoring to instruct the students of the West Point Military Academy in the art of war by compelling them to read the official reports of all the leading battles which have been fought in the world's history. . . . In our judgment, the chief value of the present work consists in the Summary which Professor Langdell has appended to the second volume. We cannot doubt that it is a valuable review of the matter presented in the cases. At a glance we can see that it performs one important office: it points out which of them are overruled!

In 1881, this criticism was the subject of an admirable and vigorous answer by a writer in the *Southern Law Review* (Vol. VI), who said, "there is an obstinacy in learning more inveterate than in ignorance. Ignorance can be instructed and learning cannot."

In 1882, however, reviewing *Ames' Cases on Bills and Notes*, the *Southern Law Review* (Vol. VIII) showed that the Case System was being accepted by the profession:

The student gets a clear conception of the history and growth of the law both in England and the United States and is so enabled to master more thoroughly the principles and reasons that underlie the same. And herein especially lies the chief merit of

this system of legal education introduced and pursued with such gratifying success in Harvard Law School—this study of cases instead of treatises. The student is led to examine and analyze the cases as he will be bound to when in active practice; in doing this he learns the law by tracing its history and growth, becomes familiar with the cases, with the methods of legal reasoning employed by counsel and judges and gradually forms opinions of his own as he progresses in respect of the soundness of the decisions which he studies. The value of such training is very great.

Meanwhile, the first physical results of the introduction of the Case System and of the somewhat heated feeling and strong opposition, aroused among Boston lawyers, by the change in methods at Harvard, was the establishment of a rival law school in Boston.

In 1872, the Trustees of Boston University (founded in 1869) determined to establish a law department; and George S. Hillard, a student of the Harvard Law School under Story (1830-32), and a distinguished member of the Suffolk Bar, was made Dean. The reasons for the founding of this School were mildly stated, in 1889, as follows(1):

It has long been a settled rule in legal education that a thorough and systematic knowledge of the law can best be obtained by attendance upon lectures, but in the adoption of that principle and in discouraging office study alone the profession went too far, and a necessary reaction took place; and a feeling that the best system embraced lectures in connection with the practical work of an office resulted. . . . At the time the Boston Law School was established, it was a fact that many students who would have liked to attend some law school were deterred from so doing by the fact that it rendered office work impracticable, and did not supply the place of such office experience.

It was further felt that the instruction at the nearest law school, namely at Cambridge, was particularly technical and historical, and when completed, necessitated an apprenticeship in some good attorney's office.

A more graphic and partisan view of the founding of the new School was given by James Schouler, in the same year(2):

What chagrin these last men of the old régime Washburn and Parsons felt, I well know.

(1). *Boston University Law School*, by George R. Swasey, *Green Bag*, Vol. I (1889).

(2). *Cases without Treatises*, by James Schouler, *Amer. Law Review*, Vol. XXIII (1889).

But criticism was thrown away; for the head administrator of the University, a specialist in exact sciences was a man of determination. Alumni who criticised were frozen out of the confidence of the University; and they who doubted were damned. Years passed away. A profession always conservative in its habits did not take warmly to these new methods. . . . The rumor spread abroad that young men were fitted not for the Bar but for membership in the Antiquarian Society. . . . Other law schools in the country which preferred to teach its students what to do and how to do it outstripped this historical institution in point of numbers, and, one might add, in reputation besides. One of these which was founded in a neighboring city (Boston) called in some of the rejected advisers of Harvard University, mingled the young and old in its faculty, combined whatever methods of instruction had proved useful and without gifts or money funds to strengthen it, passed the Harvard Law School in numbers. This situation made anxiety at Cambridge.

Hillard called into the service of the School an extraordinarily eminent group of lecturers, Francis Wharton, Benjamin R. Curtis, Henry W. Paine, Edmund H. Bennett, Benjamin F. Thomas, Otis P. Lord, Melville M. Bigelow, Edward L. Pierce, William B. Lawrence, Dwight Foster, Robert C. Pitnam, and Chester I. Reed.

The School opened with 60 students. In 1875 and 1876, Nicholas St. John Green acted as Dean; and in the latter year, Edmund H. Bennett became Dean. For many years, and until the principles of the Langdell System became firmly fixed, and accepted by a large proportion of the Bar, the Boston University Law School was a strong rival to the Harvard School. Since 1890, however, it has ceased to be a rival in the obnoxious sense of the word. Each School now has its particular field and scope, each recognizing the position and usefulness of the other; and the Boston School has gradually adopted the Langdell System, with modifications.

The years 1871 to 1886 were, however, as already described, years of doubt as to the permanence of the Langdell doctrine which, though firmly fixed at Harvard, was looked at askance by other law schools. Meanwhile Langdell never uttered a word of defence or propaganda of his views. He allowed them to make their way absolutely on their own merits. Convinced that they were right, he was equally convinced that others would eventually share in his belief.

In 1878, the American Bar Association was founded; and from

that date, there began a systematic consideration of the subject of legal education by the Bar of the country.

A Committee on Legal Education, appointed by the Association in 1878, consisting of Carleton Hunt of Louisiana, Chairman, Henry Stockbridge, and Edmund H. Bennett, made an elaborate Report, in 1879,(1) giving a history of law schools in Europe and also expressing its views as to the proper methods of instruction. Slight attention was paid to the Case System in this Report; and the Committee stated that in its opinion the proper method of instruction was, "by lectures and expositions with frequent recapitulations and summaries," and by an increase in the number of competent tutors, examiners, and scientific, practical instructors to aid the professors. It laid much stress on the value of Moot Courts, and also on the necessity of written examinations for degrees—this last suggestion, being a hearty endorsement of Langdell's theory in this respect.

After this Report of 1879, the American Bar Association paid practically no attention to the subject, until 1890.

Meanwhile, the organization of the Harvard Law School Association and the speeches at its first dinner, in 1886, had had an immense effect in spreading through the country an exposition of Langdell's views.(2)

Discussion of the merits of the case system, pro and con, took place in the magazines and at meetings of the various State and County Bar Associations.

Three articles in the *American Law Review* in 1888-89(3) contributed greatly to a better understanding of the fundamentals of the system—one by J. B. Bishop on *The Common Law as a System of Reasoning*, in which he showed his misunderstanding of the Case System as actually practised as follows:

The method is sometimes inaccurately termed the teaching of the law by cases—but the use of decided cases in elementary instruction has always been common and I believe universal, yet

(1) See *Amer. Bar Assn. Proc.*, Vol. II (1879).

(2) James Schouler in *Amer. Law Review*, Vol. XXIII (1889), said: "The situation made anxiety at Cambridge. The immense machinery of the great University Commemoration in 1886 was used to bring up the Harvard Law School once more; the long and splendid roll of the Alumni of that School was exposed; and by means of a new association of graduates and a prodigious expenditure of money, a sort of revival was started."

(3) See *American Law Review*, Vol. XXII and Vol. XXIII (1888-89).



not heretofore commonly practised to the exclusion of such books as *Blackstone's Commentaries*, *Kent's Commentaries*, *Greenleaf on Evidence* and *Story's Equity Jurisprudence*. So that the new method consists simply in banishing books like these. The brief explanations of the reason of the change demonstrate that while the University does not choose to pronounce in words the Common Law's utter lack of jurists, it believes it to have none, and adapts its curriculum to this belief.

An answer to this article was made by Professor John C. Gray in an article, entitled *Cases and Treatises*; and a rejoinder appeared in the next volume of the *Review*, entitled *Cases Without Treatises*, by James Schouler, in which he said that he was "glad to see the Harvard Law School fairly on the defensive at last as concerning its methods of instruction."

An able article in defence of the Harvard Law School system by Sidney G. Fisher appeared in the *American Law Register*, in 1888.(1)

In 1890, the Committee on Legal Education, of the American Bar Association, consisting of Professor William G. Hammond, George M. Sharp and Professor Henry Wade Rogers, made a Report, in which they said that they hesitated "to break the record of masterly inactivity formed by the unremitting efforts of their predecessors for at least ten successive years"; they considered the methods of teaching in vogue, and in a brief sentence they presented the very evil which the Langdell methods were intended to cure. "The defects of the present method may be summed up; they do not educate, they only instruct".(2)

The next year, 1891, the same Committee (with the addition of George O. Shattuck), in their Report, recognized the conflict which was going on between the adherents of the various methods of legal instruction, but said that it was "beneath the dignity of the Association to take part however incidentally in controversies which necessarily must become more or less personal. . . . Time and experience will furnish the final test by which all such methods must be tried."

They considered the subject, however, somewhat in detail in a non-partisan way; recommended the employment of professors

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(1) *The Teaching of Law by the Case System*, by Sidney G. Fisher, *Amer. Law Register*, Vol. XXVII (1888).

(2) *Amer. Bar Assn. Proc.*, Vol. XIII (1890).

who are practitioners as well as of those who devote all their time to teaching; and finally said (1) :

The Committee would strongly recommend that every teacher in a law school should present an outline of the subject taught in a printed form which the students may master as thoroughly as possible, and should occupy the hours spent with the class in such references and illustration as would aid them in clearly comprehending these fundamental principles and in sufficient examinations to convince himself that they have done so. . . .

The use of cases in illustration of these principles is of unquestionable service . . . but we deprecate the use of cases done without reference to the fundamental principles of the law of which we believe them to be in all cases the application.

The Report of United States Commissioner of Education in 1890-91 contained a full bibliography of Legal Education.

Meanwhile the teaching of the Case System had already been started in a law school outside of Harvard. Eugene Wambaugh, a graduate of the Harvard Law School in 1880 (now Professor there) had been made Professor of Law in the State University of Iowa, and had introduced the system in his courses during his term of service 1889-92; and the Dean of the School, Emlen McClain, became an enthusiastic disciple.

The next law school to adopt the system was that of Columbia University, where Professor William A. Keener, who resigned from the Harvard Law School as Professor in March, 1890, and was appointed Professor at Columbia in September, 1890, introduced it in his own courses, with the approbation of President Seth Low; and in the following year, Professor Dwight, who had been Dean for many years, resigned, and Keener became Dean. Most of the old teachers left the School, and their places were filled by Keener with men more or less in sympathy with his own views.

In the *Harvard Law Review* for September, 1891, appeared an editorial on *The Increasing Influence of the Langdell Case System of Instruction*, referring to its introduction at Columbia :

Although the reading of cases has not been disregarded, the manner of teaching law, at Columbia, has been mainly by means of lectures and the study of treatises. An enlarged conception of what the training of a law student should be has now led to the formation of a plan for a reorganized law school by the trustees

(1) *Amer. Bar Assn. Proc.*, Vol. XIV (1891).

of that University. The new methods of the Columbia School for the year 1891-92 are outlined in the formal announcement lately published, but they are not explained in detail. It is believed, however, that the practice which that School has followed ever since Professor Dwight became its head is now discarded, and that the Harvard system will serve as its model in the future.

The introduction of the Case System, with some slight modifications, in the very stronghold of Dean Theodore Dwight, who had been its steady opponent, was a great triumph. Within two years, it proved its own value; and in 1893, a writer in the *Columbia Law Times* said: "After two years experience with the new course, the student body of Columbia are unequivocal in its favor. To give the student who has the intelligence requisite for the successful lawyer, not only the substantive rudiments but that analytic feeling which distinguishes the attorney from his counterfeit is an object of our School."

And the *Columbia Law Times* itself said editorially:

It is really a matter of no little wonder that the introduction of the "new system" as it is called, should have excited so much opposition and criticism. The "change" was nothing more or less than the application to the study of law of the modern scientific methods of work in the field of higher education. It was the substitution of the inductive for the deductive method of study on a subject eminently suited to such an application.

In 1892, the Committee on Legal Education (comprising the same lawyers as in 1891, together with J. Hubley Ashton) reported to the American Bar Association on the three year course for law school degrees, and also considered the Case System, saying that it necessarily "implied that the cases have been chosen and arranged for him (the student) by a teacher who knows what he desires to accomplish and how he is to effect it. . . . It is apparent . . . that the essential idea in the (Case) System is the exclusive use of cases in teaching law. The colloquy or discussion of cases, described by Professor Keener, is common to all systems of instruction, and is practised to a great extent in connection with text books, and lectures."(1)

In 1893, the American Bar Association devoted considerable time at its annual meeting (Vol. XVI) to the consideration of the subject, three important papers being read—*Existing Ques-*

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(1) *Amer. Bar Assn. Proc.*, Vol. XV (1892).

tions of *Legal Education*, by Austin Abbott; *Legal Education*, by Professor Samuel Williston; and *The Best Method of using cases in Teaching Law*, by Professor Emlen McClain.

In 1894, the following papers were read before the American Bar Association (Vol. XVII) of interest on this subject—*Some Standards of Legal Education in the West*, by John D. Lawson; *Legal Education of Undergraduates*, by Woodrow Wilson; *Law School Libraries and How to Use Them*, by Simeon E. Baldwin; *A Principle of Orthodox Legal Education*, by John H. Wigmore; *Some of the Limitations and Requirements of Legal Education in the United States*, by Edmund Wetmore; *The Inductive Method in Legal Education*, by William A. Keener—the latter paper being the fullest and most authoritative presentation of the Case System which had yet been made to the Association. A valuable *Historical Sketch of American Law Schools* was also read by Professor Henry Wade Rogers.

In 1895, (Vol. XVIII), the Report of the Committee on Legal Education, and the discussion of the Case System which followed, taken part in by Professor James B. Thayer and other Professors, were of great value in clearing up the situation.

In 1895, John F. Dillon wrote: "The great test of the teacher is: Does he inspire enthusiasm in the student? Does he set him thinking? Does he make him work? If so, the particular mode in which he accomplishes this is comparatively unimportant. The discussion concerning the competing systems of 'instruction by case law' and 'instruction by text books' has already had one beneficial result, and that result is to show that neither of these methods should be the exclusive method." (1)

From 1896 to 1902, little attention was paid to the subject by the American Bar Association. The Case System, however, was making its way in many law schools, especially in the West.

As early as 1892, the great material success of the Harvard Law School inspired a demand for graduates of the School as teachers; and in that year, the Law School of the Western Reserve University was formed on Harvard lines, laid down by Professor Wambaugh. In 1893, John Henry Wigmore, a graduate of the Harvard Law School in 1887, who had been Professor of Anglo-American Law in Fukuzawa University, Tokio, Japan, became a Professor in the Northwestern University in Chicago,

(1) *Laws and Jurisprudence of England and America*, by J. F. Dillon (1895).

introducing there the Case System, which was adopted with enthusiasm by its Dean Nathaniel Abbott. Other teachers, notably Professor Julian Mack, a graduate of the same class as Wigmore, taught the system there.

In the annual report of the University of Cincinnati for 1896, giving an account of the foundation of a law department, there appeared the following report of the Dean of the School, William H. Taft, then Judge of the Circuit Court of the United States:

In the conduct of the Law School, the Faculty decided that its wisest course would be to follow as closely as circumstances would permit, the course and methods of study prevailing at the Harvard Law School. The Harvard Law School is undoubtedly the most thorough and satisfactory school for the study of Anglo-American law in the world and we would set before us no higher standard. It was resolved to admit no applicant to our school who was not a graduate of a high school or an academy of equivalent standing or who could not pass an examination showing proficiency in those branches of a high school education important as a basis for the study of law. No one is now admitted to the Harvard Law School who is not the graduate of a college, but we did not deem it wise in a new school to make the requirements quite so high.

In the study of Contracts, Torts and Property, the instructors have adopted the Case System as it is pursued at Harvard and the same books of select cases are used by the students. . . . For the first year's work we follow the Harvard curriculum exactly. . . . The above course was selected from the larger one at Harvard after a full consultation by correspondence with the members of the Harvard Law Faculty. It may not be improper for us at this point publicly to acknowledge the very great assistance we have derived . . . from that Faculty and to tender our thanks for the same.

In 1902, the Law Department of the University of Chicago was started; and the interesting experiment was tried of inviting one of the Harvard Law School Professors, Joseph H. Beale, Jr., to become the first Dean, and to initiate the Harvard system there. Professor Ernest Freund thus describes the event(1):

When in the early part of the year 1902 the long-cherished project of establishing a law school as a part of this University was about to be carried out, and methods and men were being considered for the work of organization, our eyes not unnaturally turned toward the most famous and most successful law school

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(1) *University Record*, Vol. IX, June, 1904.

of the English-speaking world. It was not chiefly or primarily the method of instruction which had become identified with the name of Harvard that challenged admiration—on that point the attitude of the University was that of the open mind; but the spirit of earnestness and devotion to their chosen work on the part of the students, for which that School was distinguished, it was deemed essential to transplant and reproduce in the School that was to be organized here. That spirit, we knew, could not be altogether the result of a system, but must have been due to the men who administered the system.

It was therefore decided at once and by common consent to invite one of these men—one of the younger men, but a ripe scholar and known to be capable of inspiring his students with enthusiasm—to invite Mr. Beale to assume the Deanship of the School of Law.

The qualification with which this invitation was accepted was in a manner unique and unprecedented: the University secured the services of Mr. Beale only for a term of two years, and circumstances made it necessary that part of this time should be spent by him out of residence. Still I am sure that all who are connected with the Law School are agreed that experience has demonstrated the wisdom of even this arrangement—an arrangement which illustrated in a striking manner the spirit of goodwill and co-operation existing between the great institution of the East and her younger rival in the West.

We are glad to have had this much of Mr. Beale, and we are sorry to see him part from us. This is the end of his two years' term, and his separation from the School closes the first and preliminary chapter of its history. This is not the time or place to speak of results or prospects; but I may be permitted to give expression to the gratitude which we feel for the help that he has given us, and to the gratification which has come from co-operating, though for all too brief a period, with one whose freshness and vigor of mind, and whose love of sound law, has been a constant stimulus and inspiration to his colleagues and his students.

In this same year, 1902, thirty-two years after Langdell had introduced the Case System at Harvard, its progress was summed up by Professor Ernest W. Huffcut, of Cornell, in an address before the American Bar Association.<sup>(1)</sup> Of the 98 law schools reporting to him, he stated, 12 had unequivocally adopted the Case System; 34 had unequivocally adopted the text book system or the text book and lecture system; 33 employed a combination of the Case System with use of text books and lectures; 15

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(1) *A Decade of Progress in Legal Education*, by E. W. Huffcut, *Amer. Bar Assn. Proc.*, Vol. XXV (1902).

announced the use of both text books and cases for regular study and discussion. And he summed up the situation as follows:

Many schools seem to think it necessary to explain in great detail the reasons for the adoption of a practically exclusive method or for the combination of varying methods, and this fact is, perhaps, evidence enough that the law school world is still in some ferment over the system introduced by Professor Langdell more than thirty years ago. It is plain, however, that that method has made great headway, and even when it is not exclusively employed, it has affected, in some degree, often in a large degree, the methods of study and instruction. The divergencies in some schools in the extent to which it is combined with the regular use of text books mark not so much a difference in the pedagogical theory of teachers, as a difference in the capacity and discipline of students. There is doubt in some quarters whether first year students fresh from the high schools can as profitably grapple with case books alone as with case books supplemented with elementary text books. Had all the students the discipline, capacity and maturity of the average junior in a college of liberal arts it is probable that the case books would more largely supplant the text books even for regular first year work.

The next real triumph of Langdell's general theory of legal education came, however, in 1903, when the Committee on Legal Education in its Report to the American Bar Association (Vol. XXVI) said, "the objects of education are first to give mental power, second to give useful knowledge. Both are of importance, the first is indispensable."

This admission that the chief purpose of a law school training was "to give mental power" was a practical admission that that system which best produced mental power was the correct system. The endorsement of the Case System must inevitably follow.

Professor J. H. Beale, Jr., writes (1908) (1):

The following important schools have come to the Harvard Law School for teachers to such an extent that their policy may be said to be largely influenced by the case method:

University of Maine, Fordham, New York; George Washington, District of Columbia; Cleveland and Cincinnati, Ohio; University of Indiana; Northwestern University, Chicago; University of Illinois; University of Wisconsin; University of Iowa; University of Missouri; University of Nebraska and Creighton University, Neb.; Washburn University, Kansas;

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(1) See letter to the author.

University of Colorado and University of Denver, Colo.; University of North Dakota; University of Utah; University of Washington and Spokane Law School, Washington; University of California and Stanford University, Cal.

In addition to the direct influence which we have exerted through our graduates who have been employed as teachers there has come in a secondary way an influence on the older law schools which have adopted in whole or in part the case method without having employed any graduates of the School, as teachers. The University of Pennsylvania some years ago took up the case method in a number of courses. Dean Lewis and Professors Pepper and Mikell, and later Bohlen and others have adopted the case method and the school may now properly be called a case school. The same thing is true in other important schools which in whole or in part have taken up this method, such as New York University; Trinity, North Carolina; University of Texas; Dickinson University, Pennsylvania; and even Michigan, where the younger teachers have successfully used the case method.

The extent of the practical endorsement that has been given by the Professors of Law may be seen from the fact that 83 Case Books are advertised in the *Harvard Law Review* (June 1908), of which only 27 are prepared by Professors of the Harvard Law School, the others being the work of Professors in the Law Schools of Columbia, Cornell, University of Michigan, Boston University, University of Indiana, University of Missouri, University of Minnesota, University of Pennsylvania, University of Chicago, George Washington University, Northwestern University, University of Nebraska, New York Law School, University of the City of New York. In addition, a series of over thirty volumes "covering the fundamentals of the law for the purpose of class room instruction" known as the *American Case Book Series* is in preparation (1908) under the general editorial charge of James Brown Scott, formerly Professor and Dean of the Law School of Columbia University, and now Professor of Law in George Washington University.<sup>(1)</sup>

Of the influence of the School and of Langdell's theories upon the development of legal education in England only brief mention can here be made; but the subject is worthy of careful study.

As early as 1847, Professor Greenleaf writing to Harvard Corporation said: "In the discussion of the subject in England

(1) In this connection it may be of interest to refer to an article by Professor Albert Martin Kales entitled *The Next Step in the Evolution of the Case Book*, in *Harv. Law Review*, Vol. XXI (1907); and to an article by Henry W. Ballantine on *Adapting the Case Book to the needs of Professional Training*, in *Amer. Law School Review*, Vol. II (1908).



and especially before the Parliamentary Committee, this Institution has been repeatedly appealed to by the friends of academical instruction as an example worthy of imitation there and I believe it has had its effect in the recent revival of readings and lectures in the Inns of Court." (1)

As is well known, little improvement in methods of legal education occurred in England until about 1870, when, just at the time that Eliot and Langdell were stirring their great reforms at Harvard, Sir Richard Bethel (Lord Chancellor Westbury) and Sir Roundell Palmer (Lord Chancellor Selborne) promoted a vigorous agitation for additional facilities of legal instruction.

Visits to American law schools by Professors James Bryce and A. V. Dicey in 1871, and by Professors Gerard Brown Finch and Frederick Pollock in 1885, resulted in the partial introduction of Langdell's system at Cambridge and Oxford and its enthusiastic support by Pollock in the editorial columns of the *Law Quarterly Review*. And from that time to the present, slowly and gradually, these American and Harvard ideas have been gaining ground in the English Universities and with the English Bar.

One of the most eloquent articles ever written in advocacy and description of the Harvard Law School and its methods appeared in the *Contemporary Review* for November, 1899, written by Professor Dicey, after his residence at Harvard during his course of lectures to the School in 1898. (2)

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(1) See *Harv. Coll. Papers*, 2nd Series, Vol. XV.

(2) Those interested in the progress of English legal education are referred for further detail to the following authorities:

*Report of the House of Commons Committee on Legal Education* (1846).

*Address of Lord Westbury before the Juridical Society in Law Times*, Vol. XLVIII (April 23, 1870).

*Law Quarterly Review*, Vol. II (Jan. 1886); Vol. III (1887); Vol. V (1889).

*Legal Education in England*, by George H. Emmott, *Amer. Bar Assn. Proc.*, Vol. XIX (1896).

*Legal Education and the Universities*, by E. C. Clark, *Law Quarterly Review*, Vol. XII (1896).

*A Movement in English Legal Education*, by Charles N. Gregory, *Harv. Law Review*, Vol. X (1897).

*State of Legal Education in the World*, by Charles N. Gregory, *Amer. Bar Assn. Proc.*, Vol. XXIII (1900).

*The Uses of Legal History*, by Montague Crackenthorpe, *Amer. Bar Assn. Proc.*, Vol. XIX (1896).

*Legal Education and Reform of the Inns*, *Law Journal*, Vol. VIII.

*Improvement of Legal Education*, by Lord Selborne, *Law Mag. and Review*, (N. S.), Vol. IV (1875).

*The Movement in Legal Education*, *Law Times*, Vol. C (Jan. 18, 1896).

As a final quotation, however, there remains to be cited the most comprehensive tribute ever paid to Langdell's theories, and to the influence of the Harvard Law School,—that given by President Eliot at the dinner of the Harvard Law School Association in 1891, when he said:

The modern training in the law is one of the most strenuous of intellectual training, developing not any special faculty, so much as the whole reasoning powers. . . . I should like to add that the whole University here in Cambridge has been indebted to the Law School for the development of methods of instruction. . . . This is a service which has been rendered not to law alone. History, the physical sciences, chemistry, physics, the languages, the fine arts, add to the development of the method which is applicable to all fields of knowledge.

When we recall the great jurists whom the Harvard Law School has brought into its service as teachers, the men whom it has trained and sent forth into the world to achieve fame and honor, the professional ideals which it has ever inculcated, the standards of education which it has fostered, and the movement towards higher legal thought and practice which it has started, we may well say with President Eliot—these are services which have been rendered not to law alone.

And with these words I close this history.

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*Lord Halsbury on Legal Education*, by Edward Jenks, *Law Times*, Vol. C (1896).

*Legal Education in Connection with the Proposed Teaching University of London*, by Lord Russell, *Law Mag. and Rev.*, 4th Series, Vol. XXIII (May, 1898).

## APPENDIX I.

### APPOINTMENT OF PROFESSORS.

By mistake, it has been stated on page 432 of the second volume of this history that the vacancy left by the resignation of Professor Oliver Wendell Holmes Jr. was filled by the appointment of William A. Keener.

This should be corrected. Mr. Keener was appointed as an Assistant Professor, May 14, 1883; and the vacant New (or Weld) Professorship was filled by the transfer to that position of Professor Thayer (then Royall Professor), October 8, 1883. Professor Gray (then Story Professor) was made Royall Professor, November 12, 1883. The Story Professorship remained unoccupied until Assistant Professor Keener was appointed to fill it, May 14, 1888 (See page 443).

Omission has also been made of the fact that Assistant Professor Williston was made a full Professor, May 13, 1895, eight years prior to his appointment to the Weld Professorship, May 25, 1903 (See page 476).

Correction should also be made of the statement on page 463 that Assistant Professor Beale became Bussey Professor, April 14, 1897. He was made a full Professor on that date, but did not succeed to the Bussey Professorship until May 26, 1903, taking the chair left vacant by the appointment of Professor Ames to the Dane Professorship.

The various Professorships to the year 1907 have been held as follows:

<i>Royall</i> —I. Parker .....	1815-1827
Ashmun .....	1829-1833
Greenleaf .....	1833-1846
Kent .....	1846-1847
J. Parker .....	1847-1868
N. Holmes .....	1868-1872
Thayer .....	1873-1883
Gray .....	1883-
<i>University</i> —A. Stearns .....	1817-1829
Allen .....	1849-1850
<i>Dane</i> —Story .....	1829-1845
Greenleaf .....	1846-1848
Parsons .....	1848-1869
Langdell .....	1870-1900
Langdell <i>Emeritus</i> .....	1900-1903
Ames .....	1903-
<i>Bussey (University)</i> —Washburn .....	1856-1876
Bradley .....	1876-1879
Ames .....	1879-1903
Beale .....	1903-

<i>Story</i> —Gray .....	1875-1883
Keener .....	1888-1890
Smith .....	1890-
<i>Weld (New)</i> —O. W. Holmes Jr.....	1882-1883
Thayer .....	1883-1902
Williston .....	1903-
<i>Bemis</i> —Strobel .....	1898-1907
<i>Langdell</i> —Wambaugh .....	1903-

Williston was first appointed a full Professor May 13, 1895; Wambaugh, April 25, 1892; Ames, June 25, 1877; Brannan, June 15, 1898.

## APPENDIX II.

### LAW SCHOOL STUDENTS OF 1862.

Since this history was finished the author has received from James Green of Worcester, Mass. (L. S. 1863-64), a pamphlet entitled *Personal Recollections of Daniel Henry Chamberlain*, published 1908, which gives an interesting reminiscence of some well-known Law School students of the years 1862-64, as follows:

"On leaving college (1862), Chamberlain came at once to the Harvard Law School, where there was a very strong representation of Yale men at the time. I remember two 'Wooden Spoon' men—Stanford Newell of St. Paul, Minnesota, and George C. S. Southworth of Springfield, Massachusetts. (The 'Wooden Spoon' was supposed to be elected to that title at Yale on account of his surpassing good fellowship.) There were also two 'Class Orators.' Fred. Adams was known by his Yale nickname of 'Judge,' because of his learning and fairness of mind. He is now a judge of high repute on the New Jersey Court of Appeals. William C. Whitney was afterwards Secretary of the Navy. George Gray and Anthony Higgins, the latter from Yale, were afterwards United States Senators from Delaware. Henry F. Dimock afterwards left the New York Bar for a successful business career. Of Harvard men in the Law School, Albert Stickney was long prominent at the New York Bar, and was one of Samuel J. Tilden's ablest lieutenants in the war against the Tweed ring. Stickney had pulled in the Harvard four-oar boat with Charles W. Eliot, now the President of Harvard, and with Alexander Agassiz. George B. Young, who has since been a Justice of the Supreme Court of Minnesota and a railroad lawyer of national fame, was then in the School, and so was Edward D. McCarthy, afterwards a prominent admiralty lawyer in New York City. There, too, were Henry James, who became the novelist; John Fiske, the historian, and John E. Hudson, the head of the Bell Telephone system. Charles S. Fairchild of Harvard, 1863, was afterwards Secretary of the Treasury. Chamberlain was in the School for a little over a year. He took part in the discussion of "Parliament," where political discussions were debated Friday nights; he belonged to various law clubs; he helped Professor Washburn prepare a new edition of his 'Law of Real Property,' and worked for Professor Parsons upon more than one of his law books. With all this hard work he found plenty of time for social life and was one of the best-liked men in the School. I remember his reading 'Fearne on Contingent Remainders,' after he had studied law about a year, while all the rest of his law work in the School was going on; and when we quizzed him about it, because it represented the 'dry-as-dust' of the law, he said he was testing himself in this way to see what progress he had made in the law and how much he really could

understand. Ex-Secretary Fairchild has lately said that he remembered Chamberlain as, on the whole, the ablest man of his time in the Harvard Law School.

But Chamberlain had been an Abolitionist, an advocate of emancipation by war, and known in college as a 'Worcester man.' The war was still going on—at the opening of 1864—and Chamberlain felt that he must take a part in the military service or lose his self-respect; and he got an appointment by Governor Andrew to a lieutenancy in the Fifth Massachusetts Cavalry, a corps of colored men, and left his Law-School course unfinished to go off into camp at Readville. This was the regiment which Harry S. Russell, and afterwards Charles Francis Adams, commanded, where Charles P. Bowditch and many other men of note in Boston held commissions. After a while, Chamberlain was adjutant in this regiment, and he stayed in the service to the end of the war. He made no claim to military genius; he simply wanted to do his duty.

Something that I remember of our student days was always very characteristic of this lawyer. We were working together on a Moot-Court case in the Law School, where he was intent on knowing everything that could be known about the question. When somebody questioned what the judgment was likely to be, and I had said, 'What matters it anyway if we have only presented our own side completely and forcibly?' 'Yes,' said Chamberlain, 'that is very good, but I want to win the decision.'

### APPENDIX III.

#### THE LAW SCHOOL IN THE SPANISH WAR.

A total of 83 Harvard graduates and non-graduates, who were students in the Law School, served in the Spanish War in 1898. The Class given in the following table is that in which the law students either graduated or last studied. (1)

	Harvard Graduates.	Non-Graduates.
From the Class of 1855.....	..	1
1860.....	..	1
1861.....	1	..
1868.....	..	1
1879.....	..	1
1881.....	1	..
1882.....	1	..
1884.....	1	1
1887.....	..	1
1888.....	1	..
1889.....	4	1
1890.....	..	2
1891.....	4	..
1892.....	3	3
1893.....	..	1
1894.....	2	1
1895.....	..	3
1896.....	3	2
1897.....	4	3
1898.....	7	3
1899.....	5	2
1900.....	3	3
1901.....	6	..
1902.....	5	..
1904.....	1	..
	—	—
	53	30

(1) This list has been compiled from the lists given in the Harvard Graduates Magazine, Vol. VIII (June, 1900), as compared with the Harvard College Quinquennial Catalogue.

## APPENDIX IV.

### CONDITIONS 1870-1907.

The number of students in the Law School in 1869-70, at the beginning of the year as stated in the President's Annual Report was 154.

The following table shows the growth of the School, 1870-71 to 1907-08:

Year,	Whole No. of Student.	Total of College Graduates.	Harvard Graduates.	Graduates of other colleges.	Non-Graduates.	Per cent. of College Graduates	No. of Colleges represented.
1870-71	165	77	27	50	88	47	27
1871-72	138	70	34	36	68	51	25
1872-73	117	66	34	32	51	56	25
1873-74	141	86	49	37	55	61	25
1874-75	144	82	63	19	62	57	18
1875-76	173	93	60	33	80	54	25
1876-77	199	116	74	42	83	58	30
1877-78	196	121	80	41	75	62	30
1878-79	169	109	71	38	60	64	24
1879-80	177	118	90	28	59	66	20
1880-81	161	112	82	30	49	70	19
1881-82	161	99	66	33	62	61	22
1882-83	138	93	53	35	45	67	32
1883-84	150	105	75	30	45	70	25
1884-85	156	122	85	37	34	78	31
1885-86	158	122	83	39	36	77	29
1886-87	188	143	88	55	45	76	34
1887-88	225	158	102	56	67	70	32
1888-89	225	158	105	53	67	70	32
1889-90	262	189	122	67	73	72	41
1890-91	285	200	135	65	85	70	33
1891-92	370	257	140	117	113	69	48
1892-93	405	266	132	134	139	66	54
1893-94	367	279	129	150	88	76	56
1894-95	413	310	139	171	103	75	74
1895-96	475	380	171	209	95	80	82
1896-97	490	408	186	222	82	83	82
1897-98	551	490	229	261	61	89	77
1898-99	564	503	212	291	61	89	78
1899-00	613	557	236	321	56	91	67
1900-01	655	605	252	353	50	92	83
1901-02	633	584	247	337	49	92	92
1902-03	644	600	241	359	44	93	94
1903-04	743	695	272	423	48	94	111
1904-05	766	711	286	425	55*	93	114
1905-06	727	716	295	421	11	98	118
1906-07	705	696	260	436*	9	99	126
1907-08	719	712	276*	436*	7	99	122

\*34 Harvard Seniors and 1 Dartmouth Senior who have completed the full College course, but have not received their diplomas, are reckoned as graduates. Prior to 1905-06 Harvard Seniors were not reckoned as graduates but as non-graduates.



The following table shows the number of students at the School during the whole of each year, and also during a part of each year, 1870-71 to 1893-94.

Year.	Whole No. of students.	No. present during the whole year.	No. present only part of the year.	Average number.
1870-71	165	107	58	136
1871-72	138	107	31	123
1872-73	117	109	8	113
1873-74	141	121	20	131
1874-75	144	130	14	137
1875-76	173	153	20	163
1876-77	199	168	31	184
1877-78	196	172	24	183
1878-79	169	137	32	154
1879-80	177	138	39	157
1880-81	161	136	25	149
1881-82	161	139	22	146
1882-83	138	120	18	129
1883-84	150	130	20	140
1884-85	156	139	17	148
1885-86	158	142	16	151
1886-87	188	160	28	174
1887-88	225	197	28	211
1888-89	225	198	27	212
1889-90	262	229	33	245
1890-91	285	255	30	272
1891-92	370	337	33	354
1892-93	405	369	36	388
1893-94	367	329	38	349

The table on the opposite page shows the attendance at the Law School of students from twelve of the leading colleges, 1870-71 to 1896-97:

## HARVARD LAW SCHOOL.

COLLEGE.	1870-71.	1871-72.	1872-73.	1873-74.	1874-75.	1875-76.	1876-77.	1877-78.	1878-79.	1879-80.	1880-81.	1881-82.	1882-83.	1883-84.	1884-85.	1885-86.	1886-87.	1887-88.	1888-89.	1889-90.	1890-91.	1891-92.	1892-93.	1893-94.	1894-95.	1895-96.	1896-97.
Harvard	27	34	34	49	63	59	72	79	68	88	82	65	59	74	87	82	86	102	102	123	137	140	132	129	139	171	185
Amherst	4	..	..	1	1	1	3	2	4	4	4	..	1	1	1	2	5	5	9	9	5	5	9	14	16	14	13
Bowdoin	2	..	1	..	..	3	1	1	3	3	1	1	..	2	1	..	1	2	1	1	..	8	6	6	2	3	5
Brown	2	7	7	4	..	2	3	2	2	1	3	2	2	..	2	..	3	5	5	6	7	13	14	13	11	19	17
California	1	..	..	1	1	..	..	..	..	..	..	..	..	..	..	..	..	1	1	1	..	4	4	4	7	7	7
Dartmouth	6	..	..	3	1	1	1	1	3	..	1	3	1	2	..	..	2	..	1	2	3	2	5	5	8	7	10
Michigan	..	..	1	1	..	..	1	1	1	..	..	1	1	3	3	1	2	..	1	..	2	2	4	9	2	3	3
Oberlin	..	..	..	..	..	..	..	2	2	3	1	..	1	1	..	4	6	5	2	2	..	2	4	1	2	2	2
Princeton	2	3	1	..	..	2	3	2	2	..	..	..	..	..	..	1	1	1	1	1	3	4	4	5	6	7	14
Trinity	..	1	..	..	..	..	..	..	..	..	..	2	1	3	1	1	1	1	1	2	3	2	2	2	3	4	3
Williams	3	2	..	4	1	..	1	4	..	..	..	2	..	..	..	1	1	1	..	1	3	8	7	6	7	11	11
Yale	5	2	2	4	3	3	2	2	4	1	4	8	2	2	3	7	8	8	3	8	7	22	22	19	20	32	30

The following tables from Dean Langdell's Report of 1893-94 show the division in the School in classes, the results of examination for degrees, and the results of admission examinations.

The following table exhibits the School as divided into classes since the establishment of the three-years' course and the examination for admission:

Year.	1877-78.	1878-79.	1879-80.	1880-81.	1881-82.	1882-83.	1883-84.	1884-85.	1885-86.	1886-87.	1887-88.	1888-89.	1889-90.	1890-91.	1891-92.	1892-93.	1893-94.
First .....	72	63	78	57	61	59	58	75	55	75	89	74	90	106	143	140	149
Second .....	79	50	32	58	41	38	40	37	46	47	55	66	59	73	112	119	123
Third .....	..	..	21	14	25	20	22	17	17	24	33	27	52	45	48	70	72
Special Students ..	31	47	46	32	34	21	30	28	40	42	46	58	62	61	67	76	23

In regard to the above table, it is to be observed that, although the three-years' course went into operation at the beginning of 1877-78, there was no third-year class until 1879-80. It is also to be observed that the second-year class of 1877-78 did not take the three-years' course, but was graduated at the end of the second year, that class having entered the School before the three-years' course went into operation.

The following table exhibits the results of the examination for a degree in each year since the establishment of the three-years' course:

Year.	First Year.			Second Year.			Third Year.		
	Offered.	Passed.	Failed.	Offered.	Passed.	Failed.	Offered.	Passed.	Failed.
1877-78	66	51	15	66	47	19	..	..	..
1878-79	50	42	8	40	39	1	..	..	..
1879-80	73	69	4	28	26	2	22	18	4
1880-81	45	43	2	49	46	3	18	18	0
1881-82	49	44	5	38	37	1	36	33	3
1882-83	46	44	2	36	34	2	21	19	2
1883-84	51	41	10	35	31	4	26	25	1
1884-85	61	56	5	30	29	1	23	19	4
1885-86	54	48	6	41	38	3	18	18	0
1886-87	66	59	7	40	38	2	26	26	0
1887-88	80	70	10	43	34	9	33	32	1
1888-89	72	66	6	58	55	3	30	29	1
1889-90	86	75	11	52	49	3	51	47	4
1890-91	107	102	5	62	54	8	47	46	1
1891-92	134	130	4	100	91	9	62	55	7
1892-93	139	129	10	113	101	12	71	67	4
1893-94	165	151	14	110	108	2	86	80	6

In regard to the foregoing table it is to be observed that it includes no special students, and hence that all the applicants included in it were either graduates of colleges or had passed the examination for admission. Of course this remark does not apply to the second-year class of 1877-78, and this accounts in part for the much greater number of failures in that class.

The following table exhibits the results of the examinations for admission in each year since they were established:

	1877-78.	1878-79.	1879-80.	1880-81.	1881-82.	1882-83.	1883-84.	1884-85.	1885-86.	1886-87.	1887-88.	1888-89.	1889-90.	1890-91.	1891-92.	1892-93.	1893-94.
Offered .....	16	15	18	25	19	12	12	17	17	14	33	15	20	28	38	64	36
Admitted .....	7	7	12	13	16	10	5	11	7	6	17	11	10	11	18	36	22

#### DEGREES.

As stated in the Circular of the School for 1908-09 the requirements for the degree of LL. B. are as follows:

**AGE.** At the time of receiving the degree one must have attained the age of twenty-one years.

**LENGTH OF RESIDENCE.** The required period of residence at the School is three years. Students admitted to Advanced Standing after a year's residence at another law school may count that year as one of the three years.

**EXAMINATIONS.** To receive the degree of Bachelor of Laws it is necessary to pass satisfactory examinations in the entire course of three years, Special Students being required to obtain a mark within five per cent. of that demanded for the honor degree. Students who pass these examinations with distinguished excellence will receive the degree of Bachelor of Laws, *cum laude*.

The right to take the examinations, as well as the privilege of continuing one's membership in the School at any time, is conditioned upon regular attendance at the exercises of the School.

The examinations in the studies of the first, second, and third years must be passed at the end of each year respectively.

No student who fails to pass an examination in at least four subjects at the end of the first year, or in four full courses or their equivalent at the end of the second and third years, will be allowed, unless by a special vote of the Faculty, to continue in the School, or to rejoin it at any subsequent time, unless at some regular examination he obtain a general average, on the entire work of the year in which he failed, at least five per cent. higher than the usual passing mark.

No student who has more than one condition standing against him on the work of the first two years will be allowed to register as a Third-Year student, or to graduate at the end of his third year. He may, however, although registered as a Second-Year student, take and count towards his degree a limited number of the Third-Year subjects, the number varying according to the number of his conditions.

No student who fails, on account of conditions, to receive his degree in due course, will be permitted, except by special vote of the Faculty, to remove his conditions later than two years after the graduation of his regular class.

Every person who, while a member of the School, shall pass a satisfactory examination in one or more subjects, will be entitled to a certificate, stating the length of time he has been a member of the School and specifying the subjects in which he has passed an examination.

#### SPECIAL STUDENTS.

The following persons will be admitted as Special Students:

I. Holders of academic degrees in Arts, Literature, Philosophy or Science who are not admissible as candidates for a degree.

II. Graduates of Law Schools which confer the degree only after an examination upon a three years' course of at least eight months in each year.

III. Persons who have never received a degree, but who have attained the age of twenty-one years, will, in rare instances, be admitted as Special Students by special vote of the Faculty. Those who wish to enter by such a vote should make application to the Secretary not later than the first day of May, stating the circumstances which prevented them from receiving a college education, and giving their age, their previous mental training, their occupation, if any, and the name of two persons familiar with their character, ability, and attainments. Those applicants whose

record seems to the Faculty sufficiently promising will be admitted to the School upon passing, in September, satisfactory examinations in Blackstone, in the translation from standard Latin and French prose authors, and in the rendering of passages of easy English prose into Latin and French.

#### ADVANCED STANDING.

Any person who, after becoming entitled to enter this School as a regular student, has been in regular attendance for at least one academic year of not less than eight months at another law school having a three years' course for its degree, will be admitted to the Second-Year class upon passing satisfactorily, in June, the annual examinations in the studies of the First Year. This examination will require a thorough knowledge of the following books: Wambaugh's *Cases on Agency*; Gray's *Cases on Property*, vols 1, 2 (2d ed.); Williston's *Cases on Contracts*; *Cases on Torts*: Ames, vol. 1 (2d ed.), and Smith, vol. 2 (with supplement); Beale's *Cases on Criminal Law*; Ames's *Cases on Pleading* (2d ed.). The examination is by printed questions, which the candidates answer in writing in the presence of the examiner.

#### FINANCES.

President Eliot at the meeting of the Harvard Law School Association held in honor of Langdell, June 25, 1895, said:

And now I come to a third of Professor Langdell's achievements, one which, I venture to say, has greatly commended itself to his Scotch nature. I refer to the extraordinary pecuniary success of the Law School. He never shrank from any measure of change because it threatened a loss of pecuniary resources. . . . But when in time the success of his work was demonstrated . . . it was a sincere delight to the Dean that the Law School became the most prosperous of all the departments of the University.

A synopsis of the financial condition of the School, 1869-70 to 1906-07 well illustrated the above remark.

The following table shows the totals of the funds of the School at the end of each fiscal year; also the receipts and payments of the School and the yearly balance or deficit (sums marked \* being deficits). This table has been compiled from the Annual Reports of the President.

	Funds.	Receipts.	Payments.	Balance.
1869-70	\$36,781.55	\$21,679.87	\$20,467.27	\$1,212.60
1870-71	36,781.55	24,962.35	25,660.54	698.19*
1871-72	36,781.55	27,681.39	27,286.00	395.39
1872-73	36,781.55	22,915.12	22,806.73	108.39
1873-74	42,486.84	29,748.75	23,849.05	5,899.70
1874-75	47,701.61	29,876.95	24,662.18	5,214.77
1875-76	51,614.15	32,618.25	30,994.79	1,623.46
1876-77	56,980.07	34,635.41	29,269.49	5,365.92
1877-78	58,246.71	33,487.66	32,220.92	1,266.74
1878-79	53,689.80	26,805.14	31,362.15	4,557.01*
1879-80	55,456.95	29,228.39	27,461.24	1,767.15
1880-81	56,132.72	27,198.28	26,522.51	675.77
1881-82	296,866.78	166,540.85	41,036.79	364.26
1882-83	205,459.60	34,180.03	132,378.46	1,674.76*
1883-84	179,632.78	32,921.77	66,179.66	412.86*
1884-85	173,860.53	39,744.79	38,304.25	3,176.94
1885-86	176,898.40	35,408.14	32,151.99	2,889.54
1886-87	180,049.67	37,918.51	34,767.24	2,850.38
1887-88	188,562.66	45,521.60	36,639.61	8,291.19
1888-89	200,425.54	45,714.15	38,851.27	6,525.86
1889-90	217,619.47	52,454.55	40,260.62	12,193.93
1890-91	234,255.35	57,038.34	45,402.46	11,635.88
1891-92	252,729.49	69,392.04	51,077.90	18,314.14
1892-93	319,930.45	78,027.42	61,671.69	13,818.56
1893-94	332,518.98	73,398.38	59,732.05	11,134.77
1894-95	359,565.68	83,534.17	56,487.47	24,568.11
1895-96	383,655.65	89,725.97	65,636.00	21,378.97
1896-97	394,271.09	94,950.89	84,335.45	7,103.88
1897-98	427,378.08	103,381.81	70,273.92	29,624.34
1898-99	457,926.65	107,052.77	79,505.10	27,194.11
1899-00	490,890.38	117,401.68	84,437.95	32,870.16
1900-01	524,419.51	122,737.96	89,208.83	33,225.25
1901-02	566,766.27	122,096.03	79,749.27	41,959.67
1902-03	600,317.23	125,519.00	91,968.04	31,522.18
1903-04	649,078.83	141,030.23	92,286.63	44,674.21
1904-05	693,198.53	146,906.73	101,202.03	41,351.22
1905-06	842,346.00	265,200.24	115,226.87	24,834.78
1906-07	641,505.44	141,203.24	346,069.33	215,286.08*

During the period of thirty-seven years covered by the above table there were only four years in which the expenses of the School exceeded its receipts, 1870-71, 1878-1879, 1882-83, 1883-84, the latter two years being the years of extraordinary expense in moving into Austin Hall.

The large increase in 1881-82 in receipts was due to the gift of the Austin Hall Building Fund of \$125,139.80, the Law School Book Fund of \$25,233, and the New Professorship Fund of \$90,000. In 1882-83 the funds included the unexpected portion of the Austin Hall Building Fund amounting to \$25,653.33, the Law School Book Fund of \$32,021.25, and the New Professorship Fund of \$90,000.

The increase in 1892-93 was due to Bemis Professorship Fund, \$50,000.00.

In 1898-99, the James Barr Ames Prize Fund, \$3,000, was first included.

# CONDITIONS 1870-1907.

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## Income of Funds and Gifts.

Law School balance (interest on).....	\$10,292.15	
James Barr Ames Loan.....	26.86	
James Barr Ames Prize.....	103.94	
Gift of James Munson Barnard and Augusta Barnard. Interest on balance..	40.24	
Bemis Professorship .....	3,839.72	
Bussey Professorship .....	1,177.42	
Bussey Trust (part, see pp. 106, 117, 131) .....	2,710.28	
James C. Carter Professorship.....	5,045.76	
James Coolidge Carter Loan.....	591.51	
Dane Professorship .....	773.32	
Samuel Phillips Prescott Fay 1798 Fund and Scholarship .....	81.85	
George Fisher Scholarship.....	175.04	
John Foster, for Medical Students and for Law Students in alternate years..	155.70	
Hughes Loan. Interest.....	\$37.12	
Repayments ...	234.60	271.72
Law School Book.....	2,308.73	
Law School Library .....	4,910.00	
Royall Professorship .....	409.54	
Weld Professorship .....	4,664.25	
Scholarship Money Returned.		
Interest .....	\$24.35	
Repayments .....	219.00	243.35
Interest on account of tuition fees paid in advance .....	495.36	
Tuition fees .....	102,880.00	
Sale of catalogues .....	6.50	141,203.24
		<u>\$146,203.24</u>

## PAYMENTS 1906-07.

The payments for the Law School for 1906-07 were:

### From Funds and Gifts.

James Barr Ames Prize.....	\$410.00
Gift of James Munson Barnard and Augusta Barnard for books .....	14.37
Hughes Loan .....	551.00
Scholarships from unrestricted income .....	\$5,250.00
Salaries for instruction .....	53,475.00



Librarians and Assistants .....	11,136.91
Secretary .....	675.00
Services of examiners and proctors.....	343.50
Repairs and improvements .....	320.46
Care and cleaning .....	1,665.08
Fuel .....	679.04
Water .....	98.45
Lighting .....	1,416.21
Printing .....	2,839.73
Furniture .....	168.83
Stationery and postage .....	601.96
Telephone .....	77.50
Books .....	14,670.83
Binding .....	2,998.52
Cleaning and moving books .....	32.00
Advertising .....	125.00
Insurance .....	226.17
	<hr/>
	\$96,800.19

## PROFESSORSHIP INCOMES.

The following table gives the amount of the income of various Professorship Funds and of the Bussey Trust Fund at the end of each fiscal year. It will be noticed that all (except the Bemis Professorship) show a more or less steady decrease of income. The income of the Bussey Trust Fund shows great variations, from a maximum of \$8,837.49 in 1873-74 to a minimum of \$1,752.64 in 1879-80. The principal of this fund being largely invested in real estate suffered greatly in the Boston Fire, and is naturally subject to varying conditions. For the first four years of this period covered it was carried on the Treasurer's books at \$410,191.68. Beginning with 1873-74 it was \$413,092.80 until 1893-94, since which date it has been carried at \$413,709.18. This table has been compiled from the Annual Reports of the President.

	Royall Prof.	Dane Prof.	Bussey Prof.	Bussey Trust.	New (Weld) Prof.	Bennis Prof.
1868-69	\$575.91	\$1,087.50	\$915.33	\$5,627.61		
1869-70	532.22	1,005.00	845.90	7,771.75		
1870-71	587.03	1,108.06	1,022.62	8,430.81		
1871-72	621.30	1,173.00	1,175.00	8,223.76		
1872-73	591.00	1,116.00	1,029.55	4,583.57		
1873-74	655.38	1,237.50	1,141.63	8,837.49		
1874-75	561.64	1,060.50	1,261.64	8,748.56		
1875-76	536.22	1,012.50	1,541.57	8,577.96		
1876-77	530.19	1,001.70	1,525.13	4,451.49		
1877-78	488.75	927.95	1,405.23	4,412.76		
1878-79	473.77	894.60	1,362.06	2,556.67		
1879-80	471.49	889.88	1,354.67	1,752.64		
1880-81	447.08	844.20	1,285.33	1,775.76		
1881-82	468.76	885.15	1,347.68	2,342.53		
1882-83	464.59	877.28	1,335.69	2,611.74	\$4,500.00	
1883-84	431.23	814.28	1,239.77	2,819.24	4,739.37	
1884-85	452.92	855.23	1,302.11	2,174.04	5,066.78	
1885-86	432.90	817.43	1,244.96	3,828.17	4,866.61	
1886-87	425.39	803.25	1,222.98	2,783.94	4,806.89	
1887-88	417.50	787.50	1,199.00	3,856.54	4,721.80	
1888-89	426.23	804.83	1,225.38	3,852.45	4,837.02	
1889-90	412.05	778.05	1,184.61	4,436.53	4,692.75	
1890-91	429.56	811.12	1,234.97	3,917.12	4,892.24	
1891-92	429.56	811.12	1,234.97	3,224.87	4,892.24	
1892-93	416.26	785.92	1,196.60	3,729.38	4,740.25	
1893-94	403.70	762.30	1,160.63	4,572.64	4,597.76	\$2,537.17
1894-95	377.01	711.90	1,083.90	8,005.16	4,293.78	2,531.56
1895-96	394.53	744.97	1,134.25	2,401.34	4,493.26	2,478.59
1896-97	392.03	740.25	1,127.06	4,520.70	4,464.76	2,821.22
1897-98	364.50	688.27	1,047.93	5,252.18	4,151.28	2,746.41
1898-99	382.85	722.93	1,100.68	4,021.62	4,360.20	3,010.72
1899-00	380.35	718.20	1,093.49	5,692.01	4,331.77	2,991.54
1900-01	392.03	740.25	1,127.06	3,947.38	4,464.76	3,083.39
1901-02	400.37	756.00	1,151.04	4,919.26	4,559.76	3,152.98
1902-03	390.36	737.10	1,122.26	2,949.10	4,445.77	3,081.31
1903-04	397.00	751.28	1,143.85	2,995.47	4,531.26	3,239.88
1904-05	410.37	774.90	1,179.81	2,127.58	4,673.75	3,501.17
1905-06	395.36	746.55	1,136.65	3,256.16	4,502.76	3,539.03
1906-07	409.54	773.52	1,177.42	2,710.28	4,664.25	3,839.72

GIFTS SINCE 1890.

Previous to 1890, the gifts to the School were few, and have already been mentioned. The gifts to the Library have been set forth separately in the chapters relating to the Library of the various periods in its history. The following gifts were made to the School itself, 1890-1907:

1890-91. \$170 from Samuel Williston as repayment of scholarship money received while a law student.

\$1,000 through Louis D. Brandeis from an anonymous friend for a course on Peculiarities of Massachusetts Law and Practice.

- 1891-92. \$1,000 from Louis D. Brandeis (as above).
- 1892-93. \$1,000 from Louis D. Brandeis (as above).
- 1893-94. \$1,000 from the Harvard Law School Association for a course of lectures on Conflict of Laws.
- 1894-95. \$1,000 from Louis D. Brandeis (as above).
- 1895-96. (None.)
- 1896-97. \$503 from Julian W. Mack to be added to the balance of "Scholarship Money Returned."<sup>(1)</sup>
- 1897-98. \$246.50 from Julian W. Mack repayment of scholarship money.  
\$700 from James Byrne as repayment of scholarship money.
- 1898-99. \$3,000 from Julian W. Mack to establish the James Barr Ames Fund from the income of which a prize not less than \$400 shall be from time to time awarded for a meritorious essay or book on some legal subject."
- \$150 from Julian W. Mack towards "The Ames Prize" of \$500, which is to be awarded in 1901 from this gift and from the income of the "James Barr Ames Fund."
- \$600 from the Harvard Law School Association to pay for lectures on "Changes in the English Law during the 19th Century."
- 1899-00. (None.)
- 1901-02. (None.)

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(1) In his report for 1896-97, Dean Ames said:

"Within recent years three alumni have repaid the amount of money received by them as holders of scholarships when students at the School. At the suggestion of one of these, who insisted upon adding to his contribution compound interest for ten years, the money coming from former holders of scholarships has been set apart as a special loan fund for the benefit of meritorious students in years to come. It is believed that many other recipients of scholarships will be glad to add to this fund, and thereby give to their successors the advantage that they themselves enjoyed."

In his report for 1897-97, Dean Ames said:

"It is a pleasure to mention a substantial addition to the fund of 'Scholarship Money Returned.' One of our graduates who has won a high position among the lawyers of New York, with a generous disregard of the usual correspondence between payment and repayment, has given to the School more than doubled what he received in scholarships. It is a noteworthy fact that a majority of those who have returned their scholarship money are now professors in law schools, and that all have had some experience in teaching law."

1901-02. (None.)

May 26, 1903. The sum of \$500 was received from Charles James Hughes, Jr., and the Corporation voted on recommendation of the Law Faculty, to use it as a loan fund to students to be called the Hughes Loan Fund.

Dec. 14, 1903. An anonymous gift of \$75 was received to be used for the benefit of some deserving law student with special reference to any recommendation which Professor Jeremiah Smith may make.

Sept. 27, 1904. A gift from Prof. J. B. Ames of \$500 "for the benefit of law students who are in need of pecuniary aid, and who by reason of their character, capacity and wealth promise to be efficient and influential members of the community in which they live."

1905-06. Dean Ames reported as follows:

"Miss Frances A. L. Haven, in memory of James Coolidge Carter, the distinguished lawyer, and the long-time friend of her father's family, gave the School \$12,000 to establish the James Coolidge Carter Loan Fund, the income of which is to be loaned to students of limited means and of exceptional character and ability. As this fund will steadily increase by the payment of interest and the repayment of loans, it is provided that the excess of income over \$1,000 may be used for the purchase of books, preferably for those relating to the subjects taught by the holder of the new professorship in the Law School, created by the bequest of Mr. Carter, and to be known as the Carter Professorship. Miss Haven's gift will be as beneficent in its results as it is interesting in its associations.

By the gift of \$3,500 the School has for the first time a scholarship wholly its own. The scholarship, to be called the George Fisher scholarship, was established by the generosity of Mrs. Austin C. Wellington, in memory and in honor of her father, the late George Fisher, who was a student in this School in the year 1853-54."

The sum of \$750 from Charles J. Hughes Jr. to be added to the Hughes Loan Fund.

#### PRIZE DISSERTATIONS.

##### *Subjects and Winners.*

(N. B.—Under each subject, the first name is that of the winner of the first prize; the second name, of the second prize.)

- 1849-50. *The Competency of Witnesses.* Dorman B. Eaton, of Burlington, Vt. John C. King, of Baltimore, Md.

*Stoppage in Transitu.* Buel Bushnell, of Warren, Ohio. George G. Williams, of Boston.

- 1850-51. *The Rights and Liabilities of Railroad Corporations.* Arthur W. Machen, of Virginia. Thomas Hitchcock, of New York.

*The Law of Landlord and Tenant.* Lemuel Shaw, Jr., of Boston. Alfred Russell, of Plymouth, N. H.

- 1851-52. *The Consideration of Contract at Law and in Equity.* Edward L. Pierce, of Dorchester. Charles R. Codman, of Boston.

*The Responsibility of a Principal for the Acts or Representation of his Agent.* Francis Howland, of New York. John Winslow, of Newton.

- 1852-53. *The Rights and Obligations of Riparian Proprietors.* Henry Woodruff, of Cincinnati, Ohio. Daniel Clark, of Maryland.

*Rights and Liabilities of Parents in Respect of Their Minor Children.* George R. Richardson, of Lowell, Mass. Charles A. Norton, of Ravenna, Ohio.

- 1853-54. *The Adoption of the Principles of Equity Jurisprudence into the Administration of the Common Law.* William P. Wells, of St. Albans, Vt. William E. Chandler, of Concord, N. H.

*Mortgages of Personal Property.* Addison Brown, of Bradford.

- 1854-55. *Husband's Power Over the Choses in Action of the Wife.* Wilder Dwight, of Brookline, Mass. A. S. Hill, of Worcester, Mass.

*Essentials of a Contract of Sale of Personal Chattels.* James W. Hurd, of Dover, N. H. George Bliss, of Springfield, Mass.

- 1855-56. *Right of Eminent Domain.* James B. Thayer, of Northampton, Mass. Jeremiah French, of Burlington, Vt.

*Mutual Relations of the Cargo to the Ship and the Ship to the Cargo.* Josiah K. Bennett, of Cambridge, Mass. Henry Crawford, of New Albany, Ind.

- 1856-57. *English Doctrine of Uses as an Element of the American Law of Conveyance.* Henry Crawford, of New Albany, Ind. John Marshall Vanmeter, of Chillicothe, Ohio.

*Conveyances by Railroad Corporations of Their Franchises and Other Property.* Alexander Martin, of Mississippi. George Putman, of Roxbury, Mass.

- 1857-58. *Right of a Legislature (without reference to the Law of Eminent Domain) to Change the Legal Character of Estates or the Title to the Property by General or Special Enactments.* William Wirt Burrage, of Cambridge, Mass. Leonard A. Jones, of Templeton, Mass.

*Right and Effect of Abandonment by the Law of Insurance.* John P. Jackson, of Newark, N. J. Harrison Lindenbower, of Buffalo, N. Y.

- 1858-59. *Forfeiture of Leasehold Estates.* Henry W. Fuller, of Concord, N. H. Francis M. Spalding, of Billerica, Mass.

*The Indorsement of Negotiable Paper by One Not a Party to It.* George M. Woodruff, of Litchfield, Conn. Joseph L. Stackpole, of Cambridge, Mass.

- 1859-60. *Estate of the Mortgagor and That of the Mortgagee in Mortgaged Real Property.* Charles F. Walcott, of Salem, Mass. Thomas Kinnicut, of Worcester, Mass.

*How Far the Security Which Shipowners Have in the Goods They Carry for the Freight Money is in the Nature of a Common Law Lien or a Privilegium of the Civil Law.* Robert D. Smith, of Cambridge. Alfred L. Edward, of New York.

- 1860-61. *Doctrine of Subrogation in Courts of Equity.* James W. Stephenson, of Cambridge. James M. Donnell, of Wells, Me.

*Covenants for Title Running With the Land.* Thomas A. Henderson, of Dover, N. H. John W. Odlin, of Concord, N. H.

- 1861-62. *Rules and Reasons for Distinguishing Property into Real and Personal.* Albert Stickney, of Cambridge. Charles L. Swan, of South Easton, Mass.

*Recent Changes in the Laws Relative to the Property of Married Women.* William G. Colburn, of Manchester, N. H. John P. Treadwell, of Portsmouth, N. H.

- 1862-63. *The Influence of the Roman Law in the Formation and Determination of the Rules and Privileges of the English and American Law.* Alonzo B. Wentworth, of Somersworth, N. H.

*Rights of Property or Easement in Subterranean Waters.* W. H. Towne, of Brookline, Mass. Melborne H. Ingalls, of Harrison, Me.

- 1863-64. *Rights, Duties and Responsibilities of the Directors, Trustees and Managers of Corporations as they Relate to the Stockholders.* James P. Brown, of Pittsburg, Pa. Flavius J. McMillan, of Colburne, C. W.

*The Extent to Which the Doctrine of Tenure as Known to the Common Law Exists in This Country and the Cases and Manner in which it Affects the Rights of Landholders.* Douglas Campbell, of Cherry Valley, N. Y. Frederic Adams, of Orange, N. J.

- 1864-65. *By What Means and to What Extent a Common Carrier May Limit His Liability.* Godfrey S. Thaler, of Stillwater, Minn. James T. Kilbreth, of Cincinnati, Ohio.

*Rights and Duties of Neutrals in Respect to the Armed Vessels of Belligerents.* Charles C. Beaman, of Cambridge. Edward W. Paige, of Schenectady, N. Y.

- 1865-66. *The Extent to Which the Common Law is Applied in Determining What Constitutes a Crime and the Nature and Degree of Punishment Consequent Thereon.* Jeremiah Travis, of St. John, N. B. David B. Lyman, of Hilo, Sandwich Islands.

*The Doctrine of Excluding What is Offered in Evidence on the Ground of Incompetency.* Jacob H. Wieting, of Middletown, Pa. Henry M. Buford, of Danville, Ky.

- 1866-67. *Sources and Limitations of the American Common Law.* Mark Anthony Blaisdell, of Boston. Samuel A. Gardner, of Cambridge.

*When and on What Ground is the Participant of the Profits of a Partnership Exempt from Liabilities as a Partner for Its Debts.* Francis W. Kittredge, of Lowell, Mass. John Q. A. Brackett, of Boston.

- 1867-68. *Uses and Advantages of the Study of the Principles and Rules of Special Pleading in Those States Where It Has Been Abolished by Statute.* Robert P. Harlow, of Middleboro, Mass. William Blaikie, of Boston.  
*Limits of the Exclusive Jurisdiction of Admiralty in the United States.* George P. Dutton, of Ellsworth, Me. George H. Bates, of Dover, Del.

- 1868-69. *Growth and Progress of the Common Law as a Science as Illustrated in History.* Edward J. Holmes, of Boston. William S. Bassford, of Atlanta, Ga.

*Whether Any, and if Any, What Warranty of Seaworthiness is Implied in Time Policies of Insurance.* Henry W. Allen, of Providence, R. I. Isaac T. Hoague, of Cambridge.

*In What Cases, if Any, and to What Extent Are Primitive or Exemplary Damages Recoverable in Actions or Tort.* Edward R. Brown, of Providence, R. I. Charles A. Merrill, of Boston.

- 1869-70. *To What Extent and With What Qualifications Communications by Telegraph Comes Within the Law of Bailment.* Austen George Fox, of New York. Marcus Rosenthal, of San Francisco, Cal.

*The Proper Scope and Limits of Expert Testimony.* Isaac Taylor Hoague, of Cambridge. Oliver John Brown, of St. Louis, Mo.

*Is More or Stronger Evidence Required to Establish Fraud in Courts of Law Than in Courts of Equity.* James Jefferson Myers, of Frewsburg, N. Y. Julius L. Brown, of Atlanta, Ga.



## APPENDIX V.

### HARVARD LAW ASSOCIATION.

It is not generally known that in 1868 an association of the alumni of the Harvard Law School was formed under the name of the Harvard Law Association. Its life, however, was brief. The following account of its origin appeared in the *Harvard Law Review*, Vol. II, in May, 1888.

*To the Editors of the HARVARD LAW REVIEW, Cambridge, Mass.:*

GENTLEMEN.—Mr. Justice John Lathrop of the Superior Court of Massachusetts recently discovered in a collection of old papers in his office in the Court House, in this city, some valuable and interesting documents and letters relating to the organization of a Harvard Law School Association in the year 1868, which he has very kindly placed in my hands to be preserved with the papers and records of the present Harvard Law School Association.

Among these papers is a printed circular containing an account of the formation of the Association of 1868, to which are appended the autograph signatures of two hundred and seventeen former members and students of the Harvard Law School, who subscribed to the constitution and united to form the Association.

Believing that this document will prove of great interest, not only to the survivors of the group of former members of the Law School who united to form this first Association of its Alumni, but also to all Harvard Law School men now living who are members of, or interested in, the present Harvard Law School Association, I send you a copy of the circular, and of the list of the original two hundred and seventeen subscribers, with the request and suggestion that they may be printed in the pages of the HARVARD LAW REVIEW.

The organization of the Association of 1868 was followed in the next year by a reunion of its members at a dinner at the Parker House, Boston, June 24, 1869, which was numerously attended. Among the distinguished guests present on that occasion who responded to toasts were: Hon. E. R. Hoar, Attorney-General of the United States; Mr. Justice Horace Gray, of the Supreme Court of Massachusetts; Professor Theophilus Parsons of the Harvard Law School; Chief Justice Charles L. Bradley of the Supreme Court of Rhode Island; Mr. Justice Storer of Ohio; Mr. Justice Charles Devens of the Supreme Court of Massachusetts; Mr. Justice John Wells of the Supreme Court of Massachusetts; Professor James Russell Lowell.

How soon thereafter the Harvard Law School Association of 1868 ceased altogether to meet for any purpose, either of business or pleasure, and

passed into history, I am unable to say, for none of the documents that have come recently into my possession relate to any proceedings, or tell the history, of the Association, subsequent to the dinner of June 24, 1869, and I am at present without other sources of information.

Very truly yours,

WINTHROP H. WADE,

*Treasurer H. L. S. Ass'n.*

### HARVARD LAW ASSOCIATION.

#### DANE LAW SCHOOL, CAMBRIDGE, MASS.

A meeting of the Students and Resident Graduates of the DANE LAW SCHOOL was held in the Library Room of Dane Hall, on the evening of the twenty-second of June, for the purpose of proposing a plan for the organization of an Association of the past and present members of the School. At this meeting a committee was appointed to make arrangements for a second meeting, and to prepare an address to the older members of the School, inviting their attendance at, and co-operation in, the proceedings of the subsequent meeting.

Agreeably to such instruction, the following circular was prepared and issued by the committee:

Cambridge, June 25, 1868.

SIR,—The many pleasant, personal, and local associations which ordinarily grow out of the assembling together of young men, for the purposes of education and general culture, have often suggested to the members of the Law School of Harvard University a desire to adopt some means of keeping alive an interest in each other's fortunes and success in life, and in preserving those relations of personal regard, which time and a separation from each other can hardly fail to dim, if not to obliterate.

Encouraged by opinions expressed by past members of the School, the present members thereof, in order to devise a plan for a more permanent union of influence and interest, convened at Dane Hall on the evening of the twenty-second inst., to consult upon the best means of accomplishing this purpose. A committee was raised to consult with former members of the School and ask their co-operation, and to address to such of them as they could reasonably expect to be present, a circular inviting them to attend a meeting at an early day for the purpose of forming an Association similar to the Alumni Associations of the New England Colleges, of such as have been members of the Harvard Law School, to come together at stated periods, and to strengthen and extend a liberal and generous sympathy among those who have been educated to the same noble science, and have shared the instruction and honors of a common *Alma Mater*.

This circular letter, subscribed by past as well as present members of the School, has accordingly been prepared, and is now forwarded to you, requesting you to meet at Dane Hall, on Thursday, July 9th, 1868, at 7½

o'clock P. M., to confer and take measures to organize such an Association. If unable to attend, please communicate your views and wishes in the premises, by letter, to be read at the meeting, addressed to GEORGE H. BATES, Cambridge, Mass.

The undersigned would venture further to suggest, in favor of such an Association, that, if organized and sustained upon the broad and generous principle of cultivating a mutual respect and regard among the members of a profession so widely extended, and embracing within its scope so many subjects of important and interesting investigation, it can hardly fail to be of great value as an instrumentality for good, beyond its bearing upon the personal relations of its members. It can be made the medium of a sound public sentiment upon matters outside of the immediate precincts of professional duty, and will go far towards creating and strengthening that relation which ought to subsist between educated men, and supplying a principle of national life and unity to the active thought of the country.

Yours truly,

GEORGE S. HILLARD,  
EMORY WASHBURN,  
BENJ. R. CURTIS,  
CHAS. THEO. RUSSELL,  
THOS. RUSSELL,  
E. P. BROWN,  
J. Q. A. BRACKETT,  
WM. H. WINTERS,  
*Of the Alumni.*

HORACE R. CHENEY.  
GEORGE H. BATES,  
THOS. MCC. BABSON,  
JOHN J. MCCOOK,  
*Of the School.*

The second meeting was held in Dane Hall, on Thursday evening, July 9th, and was organized on motion of HON. GEO. S. HILLARD, by the appointment of EX-GOV. WASHBURN as Chairman. PROF. WASHBURN, on taking the chair, made a statement of the objects of the meetings, and expressed himself as heartily in favor of the establishment of an Association of the character proposed, believing that the existence of such an organization would advantageously affect the prosperity and influence of the School; that it would be a bond of sympathy and union between the members of the profession in all parts of the Union, who have enjoyed the advantages of a legal education at Cambridge, and would assist in securing the success of those important principles and objects to which the attention of the Alumni had been called in the above circular. On motion, MR. W. H. WINTERS was appointed Secretary. HON. CHAS. THEO. RUSSELL moved that the meeting proceed to the organization of an Association of the School as proposed. The motion was carried.

On motion of HON. RICHARD H. DANA, JR., it was voted that a committee of five be appointed to draft a Constitution. The Chair appointed as members of said committee, Messrs. DANA, LATHROP, WRIGHT, BRACKETT, and BABSON.

During the absence of the committee, MR. G. H. BATES, of Delaware, read letters in response to the circular from JUDGE GEO. HOADLEY, Cincin-

nati; GEN. GEO. F. SHEPLEY, Portland; HON. ELIHU B. WASHBURN, Washington, D. C.; HON. WM. PINCKNEY WHITE, Baltimore; GOV. R. B. HAYES, Ohio; JUDGE NATKANIEL HOLMES, St. Louis; HON. A. G. MAGRATH, Charleston, S. C.; HON. CHAS. PEABODY, New York; JUDGE DEVENS, Worcester; JUDGE MARCUS MORTON; HON. JOHN C. CHURCHILL, Washington, D. C.; PROF. THEO. PARSONS, and others.

Brief and interesting addresses were also made by HON. GEO. S. HILLARD (Class of 1832), JAMES RUSSELL LOWELL (Class of 1841), HON. RICHARD H. DANA, JR., and by other gentlemen.

The Committee on the Constitution, through their Chairman, Mr. Dana, made their report.

The Constitution as adopted is hereinafter recited.

Upon the adoption of the Constitution, a committee on permanent organization, composed of Messrs. RUSSELL, LOWELL, THOMAS, CLIFFORD, and BATES, were appointed. The report of the committee was accepted, and the following members were selected as the officers of the Association for the first term:

President,	Hon. BENJAMIN R. CURTIS, Massachusetts.
Vice-Presidents,	" CHARLES BRADLEY, Rhode Island.
	" WM. M. EVARTS, New York.
	" A. S. MAGRATH, South Carolina.
	" GEORGE HOADLEY, Ohio.
	" OGDEN HOFFMAN, California.
Recording Secretary,	JOHN LATHROP, Esq., Boston.
Corresponding Secretary,	C. C. READ, " "
Treasurer,	WM. I. BOWDITCH, " "
Executive Committee,	Hon. RICHARD H. DANA, JR.
	" GEORGE S. HILLARD.
	HENRY W. MUZZEY, Esq.
	FRANK GOODWIN, "
	JOHN F. SMITH, "

The following resolution was unanimously adopted:

*Resolved*, That the members of the Association are earnestly recommended to form auxiliary local clubs in the States and principal cities of the Union, to assist in promoting the objects set forth in the preamble to the Constitution.

On motion the meeting then adjourned.

Gentlemen who have been connected with the Law School, either as professors or students, are invited to subscribe their names to the following, the Constitution.

#### CONSTITUTION OF THE HARVARD LAW ASSOCIATION.

##### *Preamble.*

The past and present members of the Dane Law School of Harvard

University unite to form "The Harvard Law Association," having in view, among others, the following objects: To maintain and advance the character of the Dane Law School,—to promote its general welfare, to revive the pleasing memories of common legal studies, to secure the highest moral and intellectual standards for the legal profession, and to purify it from sectional and all other narrowing influences; also by cultivating a mutual respect and an agreeable social intercourse among its members, to become the medium of a sound public sentiment upon matters outside of the strict limits of professional duty, and to create and strengthen those relations which ought to subsist between educated men whose position gives them influence over the life and thought of the country.

#### ART. I. MEMBERS.

All who have been connected with the Law School, either as professors or students, shall be of right members of the Association.

#### ART. II. OFFICERS.

SECTION 1. The *Officers* of the Association shall be a President, five Vice-Presidents, a Recording Secretary, a Corresponding Secretary, a Treasurer, and an Executive Committee; all of whom shall be elected at regular meetings of the Association, to serve for the term of two years.

SECT. 2. The *President* shall preside at all meetings, and perform all the other duties usually incident to that office.

SECT. 3. The *Vice-Presidents* in the order of seniority shall, in the absence of the President, perform his duties.

They shall be elected one from each of the *New England, Middle, Southern, Western, and Pacific* division of States.

SECT. 4. The *Recording Secretary* shall have charge of all records of the Association, shall make and keep accurate minutes of all meetings, shall prepare and preserve, as accurately as may be, a record of all members of the Association, with the year in which they left the School, their residence, the public positions which they may have held, and any other matters of interest concerning them. He may in his discretion appoint in any State an Assistant Secretary, whose duty it shall be to collect and forward to him any statistics in regard to the members of the Association in that section of the country.

SECT. 5. The *Corresponding Secretary* shall conduct the correspondence of the Association.

SECT. 6. The Executive Committee shall consist of five members, by election, residing in Massachusetts, and the Secretary and Treasurer, *ex-officiis*.

#### ART. III. MEETINGS.

There shall be a meeting of the Association every year, at such time as the Executive Committee shall appoint, who shall also have authority to call special meetings, with such notice as they shall deem sufficient. ..

## ART. IV. AMENDMENTS.

This Constitution may be awarded at any of the regular meetings of the Association by a vote of two-thirds of those present.

B. R. Curtis,	K. B. Kendall,	Edward Bangs,
Emory Washburn,	H. A. Scudder,	Thos. P. Proctor,
Theophilus Parsons,	Rich. H. Dana, jr.,	George E. Otis,
Nathaniel Holmes,	G. S. Hillard,	Philip H. Sears,
Darwin E. Ware,	John Lathrop,	Joseph F. Clark,
Geo. Griggs,	Austin J. Coolidge,	R. F. Fuller,
John C. Ropes,	G. H. Richards,	Edw'd D. Boit, jr.,
Edwin H. Abbot,	Jas. Hewins,	S. Lothrop Thorndike,
George M. Reed,	Fisher Ames,	John C. Gray, jr.,
J. M. F. Howard,	R. R. Bishop,	Samuel C. Davis, jr.,
F. C. Loring,	Arthur Lincoln	John Codman,
Saml. Batchelder, jr.,	George S. Frost,	Geo. A. Fisher,
Thornton K. Lothrop,	James J. Wright, C. '61,	Robert D. Smith,
Henry H. Sprague,	Benj. F. Brooks,	William W. Carruth,
Wm. W. Warren,	Henry M. Rogers,	Charles F. Walcott,
Leonard A. Jones,	Gerard C. Tobey,	Aaron E. Warner,
George Abbot James,	A. J. C. Sowdon,	John W. Titus,
Charles E. Stratton, jr.,	Woodward Emery,	Wm. C. Williamson,
Samuel S. Shaw,	John P. Treadwell,	Alonzo B. Wentworth,
C. W. Loring,	Alex. Young,	John W. Hudson,
Samuel Snow,	John T. Wilson,	Geo. H. Gordon,
Theodore H. Tyndale,	M. A. Blaisdell,	R. M. Morse, jr.,
Benj. F. Thomas,	H. J. Stevens,	Richard Stone, jr.,
A. K. P. Joy,	Nathan Morse,	C. W. Huntington,
Sam. W. Bates,	E. Augustus Alger,	B. W. Harris,
S. E. Sewall,	James F. Farley,	Chas. R. Train,
Charles F. Choate,	Jabez S. Holmes,	Max Fischacher,
Richard Olney,	Oliver Stevens,	Henry W. Muzzey,
Thomas Weston, jr.,	Charles F. Donnelly,	A. Kingsbury,
W. R. P. Washburn	Phineas Ayer,	Jos. M. Churchill,
W. W. Swan,	Chas. F. Dunbar,	Alfred Hemenway,
H. Farnum Smith,	Chas. Eustis Hubbard,	Chas. W. Storey,
J. Q. A. Brackett,	Charles G. Keyes,	Payson E. Tucker,
Wm. A. Munroe,	W. W. Blackmar,	John O. Teele,
George M. Hobbs,	A. B. Almon,	S. Arthur Bent,
William Henry Towne,	I. D. Van Duzee,	Wm. I. Bowditch,
Isaac Hull Wright,	John H. Ellis,	Horace G. Hutchins,
George B. Bigelow,	J. Lewis Stackpole,	N. S. J. Green,
Abbe C. Clark,	Jon. F. Barrett,	George Bancroft,
William Blaikie,	J. E. Bates,	H. H. Coolidge,
Frank W. Bigelow,	Geo. W. Tuxbury,	William A. Hayes, jr.,
S. H. Wentworth,	Geo. Z. Adams,	John A. Loring,
Horace R. Cheney,	William B. Durant,	Maurice Goddard.

C. M. Ellis,	Geo. Wm. Estabrook,	John L. Eldridge,
Augustine Jones,	Uriel H. Crocker,	Charles E. Powers,
Charles J. McIntire,	Edwin Wright,	John C. Park,
Albert B. Otis,	Geo. L. Roberts,	C. H. Hudson,
C. Demond,	O. B. Mowry,	Francis Bartlett,
Saml. Jennison,	T. L. Sturtevant,	John L. Thorndike,
Ambrose Wellington,	J. Brown Lord,	Linus M. Child,
Selwin Z. Bowman,	Henry L. Hallet,	Asa French,
W. P. Walley,	Frank W. Hackett,	George White,
George F. Piper,	Wm. A. Herrick,	William A. Richardson,
Moorfield Storey,	E. L. Motte,	L. B. Thompson,
Henry Hyde Smith,	Frank W. Kittredge,	Wm. P. Harding,
Thomas F. Maquire,	Wm. J. Forsaith,	J. W. Hamond,
M. E. Ingalls,	George G. Crocker,	Francis W. Palfrey,
F. W. Jacobs,	J. H. Bradley,	James J. Storrow,
Lemuel Shaw,	Joseph Willard,	S. Bartlett, jr.,
John G. King,	A. W. Lamson,	David Thaxter,
Gardiner G. Hubbard,	C. G. Thomas,	Saml. F. McCleary,
Chas. Theo. Russell,	William G. Colburn,	Charles P. Curtis,
C. C. Reed,	Jas. B. F. Thomas,	Robert Codman,
A. C. Buzell,	George W. Ware, jr.,	E. P. Nettleton,
Thomas H. Russell,	Warren Tilton,	M. F. Dickinson, junr.,
William E. Perkins,	Henry C. Hutchins,	F. W. Pelton,
D. J. Collins,	J. Wingate Thornton,	Joel Giles,
George P. Sanger,	John Noble,	Geo. R. Hastings,
Isaac S. Morse,	E. P. Brown,	Thos. Wm. Clarke,
Hales W. Suter,	A. S. Wheeler,	Alonzo V. Lynde,
N. B. Bryant,	Chas. Wheeler,	Curtis Abbott.
Hiram Wellington,	Ivers J. Austin,	
Fras. A. Brooks,	Charles Allen,	

## APPENDIX VI.

### THE HARVARD LAW SCHOOL ASSOCIATION.

On July 21, 1886, a self-appointed committee of graduates of the Harvard Law School, consisting of Darwin E. Ware, '53; John C. Ropes, '61; Henry W. Putnam, '72; Joseph B. Warner, '73; Louis D. Brandeis, '77; William Schofield, '83; and Winthrop H. Wade, '84, started a movement for the organization of an Alumni Association of the Law School, and on August 9 of that year issued a printed circular, inviting the coöperation of all graduates and former members of the School in carrying out this object. The circular set forth that the general object of such an Association should be to bring together all those members of the legal profession, who were connected by the common bond of having made their preparation, or some part of their preparation, for the practice of the law, in the Harvard Law School, and to be the means of increasing the influence and usefulness of the School. Responding cordially to this invitation, about one hundred and fifty graduates and former members of the Law School met in Boston on Sept. 23, 1886, and took the preliminary steps for the organization of the Association. They adopted a Constitution, and voted to hold the first general meeting for the election of officers, and the approval of their work of organization, at Cambridge, on Nov. 5, 1886, upon the occasion of the celebration of the 250th anniversary of the founding of Harvard College.

Thus the Harvard Law School Association was born. It proved a lusty and progressive infant from the hour of its birth. Pursuant to the call of a committee on arrangements, of which Robert M. Morse, L. S. '60, was chairman, about 400 loyal and enthusiastic graduates and former members of the School assembled at the Law School in Cambridge, on Nov. 5, 1886, enrolled themselves as members of the Association, adopted the most democratic constitution possible, and elected the following board of officers: J. C. Carter, '53, pres.; L. D. Brandeis, '77, sec.; W. H. Wade, '84, treas; council: J. M. Barker, L. S. '63; F. P. Goulding, L. S. '66; J. L. Thorndike, '68; T. H. Tyndale, L. S. '68; P. A. Collins, '71; A. L. Huntington, '74; F. P. Fish, L. S. '76; S. B. Clarke, '76; F. C. S. Bartlett, L. S. '77; A. L. Lowell, '80; William Schofield, '83; Sherman Hoar, L. S. '84. Of this board, President Carter and Councilors Barker, Goulding, Collins, Huntington, Bartlett, and Hoar have since died.

The striking feature of the Constitution is embodied in that article which admits and welcomes to membership "all graduates, all former members, and all present members of the Harvard Law School who have

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(1) This article was written by Winthrop H. Wade for the *Harvard Graduates Magazine*, June, 1907, and is republished here by his courtesy.



been such for at least one academic year exclusive of Commencement Week," and imposes only the modest annual due of one dollar upon each member, which may be commuted at any time by the payment of a life membership fee of \$15 (afterwards reduced, with marked success, to \$10). The Constitution declares the objects of the Association to be the advancement of the cause of legal education, the promotion of the interests and usefulness of the Harvard Law School, and the promotion of mutual acquaintance and good fellowship among its members.

At the close of the business meeting, which adopted this Constitution and elected the foregoing officers, the members marched to Sanders Theatre, and listened to an oration by Oliver Wendell Holmes, Jr., 1866, then an associate justice of the Supreme Judicial Court of Massachusetts, and afterwards marched to the Hemenway Gymnasium to dinner, at which Mr. Carter, the newly elected President, presided, and interesting addresses were made by President Carter, 1836; President C. W. Eliot; S. E. Sewall, 1820; Judge T. M. Cooley; A. R. Lawton, 1842; G. O. Shattuck, 1854; J. C. Gray, 1861; E. R. Hoar, 1839; and F. W. Hackett, L. S. '66. Such was the happy christening following the auspicious birth of the Association.

Immediately this vigorous infant began "to do things." On April 1, 1887, it issued a circular announcing a membership of 558, representing 29 states and territories of the United States, and the Dominion of Canada, and the preparation of a catalogue, edited by John H. Arnold, the Librarian of the School, of all the students who had ever attended the Harvard Law School. This valuable work was then done for the first time in the history of the School, and the Catalogue has since been regularly issued every five years by the Law School at the same time with the Quinquennial Catalogue of the University. The unique features of this Catalogue are, that the addresses, as well as the names, of all graduates and former students of the Law School are given, and three separate lists are printed, one by classes, one by geographical location, and one in alphabetical order, serving as an index to the other two. The Council of the Association also printed and distributed to members a handsome Memorial Report of its Celebration of Nov. 5, 1886, including the oration of Judge Holmes and the addresses at the dinner.

With a view to encouraging original work among the students of the School, the Association, on Nov. 19, 1887, appropriated from its income the sum of \$100 as a prize for the best essay to be contributed by a member of the Law School on a subject selected by a Special Committee of the Council, and this prize was first awarded to Samuel Williston, 1888 (now Weld Professor of Law in the School), for an essay on "The History of the Law of Business Corporations prior to the Year 1800." This action led two years later to the generous offer of C. C. Beaman, L. S. '65, of New York, to provide the sum of \$100 per year for a term of five years, as an annual prize, under similar conditions to be prescribed by the Council. The winners of this Law School Association prize in subsequent years were E. V. Abbot, 1889; C. E. Shattuck, 1890; E. R. Thayer, 1891; and O. R. Mitchell, 1893.

The Council of the Association next turned its attention to increasing the resources of the Law School itself, and in the first annual report of the Treasurer, issued Jan. 2, 1888, announced a gift of \$1,000 to the Law School, subscribed by ten members of the Association for the purpose of increasing the instruction of the School in the subject of Constitutional Law for the academic year of 1888-89. The donors of this gift were President Carter, '53; W. G. Russell, '45; G. O. Shattuck, '54; John Lowell, '45; George Putnam, '58; William Minot, '40; R. M. Morse, L. S. '60; J. J. Storrow, L. S. '59; A. L. Lowell, '80; and A. L. Huntington, '74.

On June 26, 1888, the Association met again in fraternal celebration in Cambridge, with Hon. D. H. Chamberlain, '64, of New York, as the Orator of the day, and President Carter, '53; President C. W. Eliot; C. C. Beaman, L. S. '65; G. O. Shattuck, '54; G. G. Crocker, '66; A. G. Fox, '71; and Alfred Hemenway, L. S. '63, as speakers at the dinner which followed in Massachusetts Hall. A full stenographic report of the oration and addresses at the dinner was printed in the *Boston Post* of the following day, and mailed to all members of the Association.

The Association had grown to a membership of 764, representing 41 states and territories, and the Dominion of Canada. A year later (1889) the membership reached 816, and included representatives from the classes of 1830, 1831, 1833, 1835, and every other class from 1838 to 1889, inclusive, while a year later still, on June 15, 1890, the total membership had mounted to 1,390 members, representing 49 states and territories, the Dominion of Canada, and four foreign countries, and comprising the names of nearly one half of the entire number of graduates and former students of the Law School then known to be living. By Jan. 1, 1891, the membership increased to 1,612; so that in a little more than four years since its birth the membership of the Association rose from 558 to 1,612, a growth of 288 per cent. This increase was largely due to the zeal and efforts of corresponding secretaries of the Association in 40 states and territories, and the Dominion of Canada, who had been appointed by the Council to represent and promote the interests of the Association in their respective localities. But this was not all. The third annual report, issued June 15, 1890, announced an anonymous gift of \$600 from a member of the Association to defray the expense of sending the *Harvard Law Review* for the year 1890-91 to all members of the Association not already subscribers, and to various public and law libraries, with the gratifying result of increasing the number of subscribers to the *Review* from 500 to 810, and its reserve funds from \$250 to \$1,250. This gift helped the *Review* forward on a career of success and distinction which it has since uninterruptedly maintained and improved. The report also announced the generous gift from another member of the Association, of \$1,000 per year for a period of five years, to defray the expense of a Course of Instruction in Massachusetts Law, beginning with the academic year of 1890-91.

With this record of accomplishment of the Law School, the *Law Review*, and itself, the Association once more met in Cambridge, on June

23, 1891. An oration in Sanders Theatre by George Tucker Bispham, Professor of Equity Jurisprudence in the University of Pennsylvania, was followed by a dinner in the Massachusetts Hall, attended by several hundred members of the Association, where interesting addresses were made by C. J. Bonaparte, '74, the presiding officer of the day; President Eliot; Dean C. C. Langdell, '53; Prof. Jeremiah Smith, L. S. '61; O. D. Baker, '72; Albert Stickey, '62; G. O. Shattuck, '54; and F. W. Hackett, L. S. '66. As before a full stenographic report of the oration and dinner addresses was printed in the *Boston Post* of the following day, and mailed to all members of the Association.

During this year (1891) the Council completed the publication and distribution of a handsome Catalogue of the members of the Association, containing an alphabetical list of its members, a list by classes, and a list arranged according to the states and cities or towns in which members resided, to which were added the Constitution and list of officers, and pictures of Dane Hall and Austin Hall, the old and new homes of the Harvard Law School.

The Association also contributed from its funds during this year (1891) the sum of \$609.25, towards the expense incurred by the Law School in publishing its second Quinquennial Catalogue, in return for which the names of all members of the Association in the geographical list of the Catalogue were printed in small capitals, a practice followed in all subsequent issues of the Catalogue, whereby the Association was henceforth relieved of the expense of printing and distributing a Catalogue of its own. Thus the Law School made a substantial contribution towards the work of the Association on its behalf. And in future issues of the Quinquennial Catalogue the Law School generously assumed the entire expense, including that of a gratuitous distribution of the Catalogue to all members of the Association.

On Jan. 1, 1892, five years after its organization, the Association numbered 1,661 members, representing every class from 1829 to 1891, inclusive (except the classes of 1826, 1827, 1828, and 1830), and 44 states and territories, Canada, and five foreign countries. Its life membership roll numbered 86, to be erected before the end of another year to 144. With all its expenses of the past five years paid, including its gifts to the Law School and the *Law Review*, the cost of its celebrations and the printing of its Memorial Reports and Catalogue, there remained in the treasury of the Association a balance of \$1,332.84.

In the following year, 1893, the Council raised by voluntary subscriptions from members and from students in the Law School the sum of \$1,517 for an oil portrait of Dean Langdell, which was painted by Mr. F. P. Vinton, and presented to the School as the gift of the Association. The portrait proved to be a striking likeness, as well as an artistic portrait, of the Dean, and elicited much approval from the graduates of the School. That all members of the Association might be informed of, and interested in, this gift to the Law School, the portrait was reproduced in photogravure in the *Harvard Law Review*, and a copy sent to each member, at the expense of the Association.

The Council during this year (1893) appropriated from its current income, and paid over to the Law School, the sum of \$1,000 to establish a Course in the Conflict of Laws for the academic year of 1893-94, and closed its financial year after these various disbursements with a surplus of \$3,461.63, of which the Life Membership Fund, now set apart and accounted for separately, amounted to \$2,806.20, and a total membership of 1,684 members.

The year 1895 (June 23) was marked by a distinguished event in the life and history of the Law School and the Association. Dean Langdell completed 25 years of service as Dean of the School, and the Association celebrated this memorable anniversary by the greatest meeting in its history. Nearly 600 of its members gathered in Cambridge, to listen to a scholarly oration in Sanders Theatre by Sir Frederick Pollock, Corpus Professor of Jurisprudence in the University of Oxford, and afterwards to dine together at the Hemenway Gymnasium, where addresses were made by President Carter, *f*53; Dean Langdell, *f*53; Sir Frederick Pollock; Judge Horace Gray, *f*49, and Judge H. B. Brown, L. S. '59, of the Supreme Court of the United States; Judge O. W. Holmes, *f*66, of the Supreme Judicial Court of Massachusetts; J. H. Choate, *f*54; Hon. Sini-chiro Kurino, *f*81, the Japanese Minister; President C. W. Eliot; C. J. Bonaparte, *f*74; Prof. W. A. Keener, *f*77, of the Columbia Law School of New York; and G. H. Wald, *f*75. Responding to the toast given in his honor at this dinner, Dean Langdell gave a brief but memorable account of his work at the School. (This address was printed in full on page 41 of the *Harvard Graduates' Magazine* for September, 1895).

During this memorable year the prosperity of the Association advanced still further. The membership increased to 1863, the life membership to 432, and this in spite of the fact that during the year the names of 199 members were dropped from the membership roll, who had paid no dues since 1891 nor manifested any interest in the Association or its objects. The Treasury balance, even after paying the extraordinary expense of the year, rose to \$6,691.03, of which the Life Membership Fund amounted to \$5,633.63. A year later the Life Membership Fund had reached the sum of \$7,056.11, while the unappropriated balance in the Treasury was \$404.03.

In 1896 the Association printed and distributed among its members a beautiful memorial Report of the Langdell Celebration, at a cost of \$1,361.58. This year (1896) marked the voluntary retirement from the presidency of the Association of J. C. Carter, *f*53, its first president, after a faithful and loyal service of ten years, and the election in his place of J. H. Choate, *f*54.

The life of the Association, after its great celebration of 1895, was unmarked by any important or striking event for a period of nine years, but its numbers and vitality steadily increased, and the stream of its good work flowed quietly on. In 1898 it contributed to the Law School the sum of \$600 to provide a course of lectures by Prof. A. V. Dicey of England, which were given at the Law School during the academic year of 1898-99, and it printed and distributed these lectures to all its mem-

bers through the medium of the *Harvard Law Review* at a cost of \$300.60. In 1902, through a committee of graduates of the Law School, it raised the sum of \$1,418.27 for an oil portrait of Prof. James B. Thayer, by Lockwood, which was formally presented to the School on the occasion of the celebration of 1904. As the cost of the portrait with the frame was \$1,575, the deficit of \$156.73 was paid from the general funds of the Association.

In 1904 (June 28) came another day of celebration and reunion by the members of the Association. From far and near they gathered in Cambridge to the number of nearly 500, and marching in procession to Sanders Theatre listened to an oration by the Secretary of War, W. H. Taft, on the Problem of the Philippines, and afterwards dined at the Harvard Union and listened to addresses by Chief Justice M. W. Fuller, L. S. '55, of the Supreme Court of the United States, the newly elected president of the Association; Secretary Taft; President Eliot; Dean J. B. Ames, '72; Chief Justice M. P. Knowlton, of the Supreme Judicial Court of Massachusetts; Richard Olney, '58; Baron Kentaro Kaneko, '78; J. D. Long, L. S. '61; Judge F. J. Swayze, L. S. '81; W. H. Rand, '91; and B. H. Lee, '88.

A very handsome Report of this great meeting, the second largest and most successful in the history of the Association, containing the oration of Secretary Taft and the addresses at the dinner, was subsequently issued and distributed to members at a cost of \$1,404.88. The celebration was accompanied by a very large increase in the membership of the Association, amounting to 480 annual members and 115 life members, thereby enabling the Association to meet without burden the extraordinary expenses of the occasion, without intrenching upon its steadily increasing Life Membership Fund. The Treasurer's Report, presented in June, 1906, and including the expenses of the celebration of 1904, showed that the Association in the 20 years of its life had accumulated a life membership fund, never encroached upon, of \$10,568.81, invested in mortgages and savings banks, with a balance of unappropriated income of \$1,282.24, while from a membership of 558 in April, 1887, a few months after its organization, it had grown in its 20th year (Feb. 14, 1906) to a membership of 2,158 (of which 737 are life members), representing 40 per cent. of the roll of living graduates and former members of the Harvard Law School. In these 20 years it expended \$7,379.60 for the current expenses of maintaining its organization and increasing its membership and prosperity, \$5,271.48 for its Memorial Celebrations, \$4,725.18 for printing and distributing its Catalogue and Memorial Reports, while out of its surplus income and the generous contributions of its members it was able to give to the Harvard Law School \$7,231 for lectures, for prizes, for the portraits of Dean Langdell and Professor Thayer, and \$1,649.15 to the *Harvard Law Review* to promote its circulation and success.

On May 10, 1905, an important report was presented to the Council by a committee consisting of C. S. Rackenmann, L. S. '81; W. H. Wade, '84; and R. L. Raymond, '98, suggesting various uses of the surplus funds of the Association, which had accumulated during the past 19 years, for the benefit of the Law School, and after a full discussion of these various

uses, the Council voted to invite Professors J. C. Gray and Jeremiah Smith to sit for their portraits, to be later presented by the Association to the Law School. Subsequently Mr. F. P. Vinton was invited to paint the portraits, and accepted the commission. He has already painted the portrait of Dean Langdell, now in the Law School.

The Council further voted to equip and maintain a handsome and comfortable reading and lounging-room for the use of the students in the Law School, to occupy some part of the new addition to the School when it should be built, but action upon this gift was subsequently suspended because of changes in the plans of the additions, which for the present would not admit of sufficient space being set aside for the reading-room contemplated.



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